

Missouri Attorney General's Opinions - 1956

Opinion	Date	Topic	Summary
2-56	Feb 15	SANITARY DRAINAGE DISTRICT. REVENUE BONDS. SEWAGE DISPOSAL.	Chapter 248, RSMo 1949, authorizes the creation by the City of Kansas City, and parts of Clay, Platte and Jackson Counties, of a sanitary drainage district to carry domestic sewage only; this district is a political subdivision which may become indebted in an amount allowed by Section 26(b), Missouri Constitution, 1945.
2-56	Mar 23	COUNTY COURTS. COUNTIES. ASSESSORS. DEPUTY ASSESSORS. TAX SHEETS. ISSUANCE OF WARRANTS BASED UPON TAX SHEETS.	(1) The county may recover the portion of the overpayment that has been made by it through the county court to the assessor. (2) The county court is entitled to count the sheets and inspect them before issuing the warrant for payment to the assessor upon said sheets. (3) There is no law making it mandatory upon the county court to advance money to the assessor sufficient to pay his deputies prior to the delivery of the tax books, and further, the county court is without authority to make such advancements prior to the delivery of the tax books.
2-56	June 14	SPECIAL CHARTERED CITIES. SEWERAGE PROJECTS. AUTHORITY OF DIVISION OF HEALTH.	The Division of Health of Missouri is without authority to require the submission of plans and specifications of sewers and sewage treatment facilities by the city of Kansas City, Missouri, since, under Section 19, Article VI, 1945 Constitution of Missouri, charter provisions of a special chartered city concerning purely municipal functions supersede the general laws relating thereto.
3-56	Feb 24	ELECTIONS.	Under the provisions of Section 111.405, RSMo Cum. Supp. 1955, the state may properly pay all necessary costs and expenses of election incurred in conducting the October 4, 1955, and January 24, 1956, elections if no other question is submitted to a vote at the "same election." The term "same election" as used in Sec. 111.405, supra, refers to an election which is required by law to be conducted by the same election officials.
3-56	June 12	LAND CLEARANCE FOR REDEVELOPMENT AUTHORITY.	The land clearance for redevelopment authority is a political subdivision of the state, within the meaning of the Social Security Act and Section 105.300, RSMo Cum. Supp. 1955.
3-56	July 12	COURT REPORTERS.	Sec. 485.065 of H.B. 384, 68 th General Assembly comprehends court reporters of St. Louis Court of Criminal Correction authorized by Sec. 485.140 of said law.
3-56	Sept 26	SOCIAL SECURITY. COUNTY	The County Agricultural Extension Council is an instrumentality of the State.

		AGRICULTURAL EXTENSION COUNCIL.	
4-56	Mar 23	CRIMINAL LAW. MISDEMEANOR CASES. MAGISTRATE COURTS. PROSECUTING ATTORNEY NOT REQUIRED TO FILE INFORMATION. WHEN.	When complaint of individual alleging commission of misdemeanor is filed in magistrate court in accordance with Sections 543.020 and 543.030 RSMo 1949, if after having fully investigated facts, prosecuting attorney believes same insufficient to sustain conviction of accused, he may, within his discretion, refuse to file information or to proceed further in matter.
4-56	Sept 26	COUNTY COURT. BOUNTIES. PREDATORS.	Section 279.010 RSMo Cum. Supp. 1955 does not authorize or direct the county court to pay a bounty for wolves, coyotes and wildcats other than animals of the full blood.
5-56	Jan 17	PUBLIC SCHOOL RETIREMENT SYSTEM.	Funds of system may be used to pay expenses of election on coming under federal social security.
5-56	Jan 27	SOCIAL SECURITY. PUBLIC SCHOOL RETIREMENT SYSTEM.	Legislature only body authorized to fix date on which service in positions covered by Public School Retirement System shall be included for coverage under Social Security Act, subject to referendum, and effective date must be in conformity with federal law.
5-56	Dec 7	STATE. BANK. CONSTITUTIONAL AMENDMENT.	Effective date of said constitutional amendment No. 3, approved by the voters on November 6, 1956, is thirty days after November 6, 1956. Surplus funds referred to therein may be placed in "Time Deposit - Open Account."
6-56	July 3	PROSECUTING ATTORNEY. CRIMINAL COSTS. CRIMINAL LAW.	Under the provisions of Sec. 56.310 RSMo 1949, the prosecuting attorney shall be allowed a fee of \$12.50 for the conviction of a defendant charged with armed robbery under the general criminal law, regardless of whether said defendant is committed to the State Board of Training Schools, or punishment is assessed at confinement in the State Penitentiary.
7-56	Mar 19	PAUPERS. COUNTIES. INSANE.	County may recover from person obligated to support an indigent insane person or from such insane person's estate amounts expended by it for support of such insane person, but cannot recover from anyone amounts expended for support of other poor persons.
9-56	Mar 16	CIGARETTE TAX. ACTION BY THE DEPARTMENT OF REVENUE.	Representatives of the cigarette tax division should make estimates of the tax and penalties due against a seller of unstamped cigarettes when the seller is known, and against the retailer when the seller is unknown.

10-56	Mar 1	SCHOOLS. SCHOOL DISTRICTS.	School district, in absence of qualifying factors, may not give property to church organization. Such attempted transfer enjoined by state at relation of prosecuting attorney.
10-56	Nov 15	SCHOOLS. SCHOOL DISTRICTS.	Plan of reorganization of school districts may not divide existing reorganized districts.
12-56	July 18	OFFICERS. COUNTY HIGHWAY. COMMISSION.	For a violation of Sec. 23.100 RSMo 1949, the members of a county highway commission could be removed from office, under the procedure specified in Secs. 106.220 RSMo 1949 et seq., or by the institution of proceedings in quo warranto.
15-56	Mar 23	Hon. James D. Carter	WITHDRAWN
15-56	Mar 26	SCHOOLS. PUBLIC SCHOOL RETIREMENT SYSTEM.	Teachers of inmates of the Department of Corrections not included.
15-56	May 1	MISSOURI RURAL REHABILITATION CORPORATION. AGRICULTURE. DEPARTMENT OF AGRICULTURE.	The Secretary of Agriculture of the United States or his delegatee has power and authority under provisions of Sec. 261.026, RSMo Cum. Supp. 1955, and under terms of agreement entered into between the United States Dept. of Agriculture and the Commissioner of Agriculture of the State of Missouri under date of January 23, 1952, to compromise, adjust and cancel under provisions of 7 USCA, Sec. 1015(g), State Rural Rehabilitation Corporation's debts and obligations to be administered by said officer under terms of 40 USCA, Sec. 40.
15-56	May 29	PLACEMENT OF CHILDREN.	Any unlicensed person who assists in placing a child in any home or institution is in violation of the law.
15-56	June 8	DEPARTMENT OF AGRICULTURE. APPROPRIATIONS.	Salary of State Commissioner of Agriculture may be paid from funds made available by Section 4.710 of House Bill No. 4, and Section 13.740 of House Bill 558, as enacted by the 68th General Assembly. The salary of the State Commissioner of Agriculture may also be paid from funds appropriated by Section 4.765 of House Bill No. 4, adopted by the 68th General Assembly if such payment is authorized by appropriate Federal authority.
15-56	June 14	COUNTY WELFARE OFFICE. COUNTY COURTS.	When county court appoints county welfare director as its agent to disburse county pauper fund under court's directions, fund does not lose identity, and does not become money contribution for support and maintenance of county welfare office within the meaning of Section 207.060, RSMo 1949. Fund shall be paid to county welfare director and not to state collector of revenue. Contributions of services or quarters for support and maintenance of county welfare office are not money contributions within meaning of Section 207.060, RSMo 1949, and shall not be paid to state collector of revenue. County Court authorized to pay same directly to persons performing services or

			furnishing quarters for county welfare office.
15-56	June 21	AGRICULTURE. EGGS.	Drivers of trucks making deliveries for a business duly licensed as a “retailer” under provisions of Chapter 196, Sec. 310 et seq., which drivers also solicit orders and sell eggs en route, are not required to obtain a retailer’s license.
15-56	Aug 13	MISSOURI RURAL REHABILITATION CORPORATION. AGRICULTURE. DEPARTMENT OF AGRICULTURE.	The Secretary of Agriculture or his delegatee does not have the power and authority to cancel State Rural Rehabilitation Corporation debts and obligations under the provisions of Public Law 518 (12 USCA § 1150 et seq.).
15-56	Aug 27	WAREHOUSES. PUBLIC WAREHOUSES. DEPARTMENT OF AGRICULTURE.	The provisions of Section 411.260 RSMo 1949, relating to the licensing of public warehouses is optional with “local public warehouses”, and such licensing is not mandatory.
18-56	Mar 1	TOWNSHIP ORGANIZATION. BOARD MEMBER PERFORMING LABOR ON DISTRICT’S ROADS CANNOT BE CRIMINALLY PROSECUTED. WHEN.	When a township board member is employed by board to maintain a district’s roads; accepts employment, maintains roads, and is paid from road district’s funds; absent facts showing violation of Sections 231.150 to 231.330 RSMo 1949; board member cannot be criminally prosecuted under provisions of Sections 231.320 and 231.330 RSMo 1949.
18-56	Apr 16	COUNTY. COUNTY COURT. COUNTY COLLECTOR. SURETY BOND OF COUNTY COLLECTOR. LIABILITY FOR PREMIUMS.	Cedar County is liable for the payment of the premiums on the surety bond of the County Collector of that county for the year of 1956.
19-56	Jan 20	ELECTIONS. ELECTION EXPENSES.	The same person may serve as a judge or clerk of a municipal bond election and at the same time serve as a judge or clerk of a special state referendum election, providing that such person is duly appointed by proper authority and can physically discharge the duties relating to both elections. Further, a county may recover from the state the expenses of conducting a special referendum election within the limits of the municipality where a municipal question is submitted to a vote at the same time and both elections are conducted by the same officials.

19-56	Jan 27	COUNTY COURTS. CIRCUIT COURT'S BUDGETARY ESTIMATES.	1. The preparation of the budget for foster homes for neglected and delinquent juveniles is the function of the juvenile court, and the inclusion by the county court in the court's budget for the circuit court's estimate is a purely ministerial function for the county court. 2. Mandamus will lie to enforce the county court to perform this ministerial function.
19-56	Mar 12	COSMETOLOGY. LICENSE. CRIMINAL LAW.	Proper procedure to invoke against shops carrying on the practice of cosmetology without obtaining a certificate of registration or renewal thereof. Revocation or suspension of operator's certificate practicing in such shops.
19-56	Apr 5	ASSESSOR. ANTI-NEPOTISM DISCRETION. QUO WARRANTO PROCEEDINGS.	(1) The assessor, Al Schwalm, has violated the anti-nepotism section (Section 6, Article VII, 1945 Missouri Constitution), and consequently, has forfeited his office. (2) It is within the discretion of the prosecuting attorney as to whether or not he shall bring an ouster action against the assessor. (3) The discretion to be exercised by the prosecuting attorney is not an arbitrary one, but one that must be exercised in good faith.
19-56	Apr 10	COUNTIES. COUNTY POOR FUND. COUNTY ROAD AND BRIDGE FUND. COUNTY BUDGET.	1. Money derived from the sale by a county of dairy herds owned by the county must be deposited in the county poor fund. 2. The money derived from the sale of ninety per cent of machinery by a county must be deposited in the county road and bridge fund where ninety per cent of such machinery was originally purchased with money from the county road and bridge fund. 3. None of such moneys to be spent this year, but all should be kept in such funds and be accounted for and used for expenditures included in next year's budget.
19-56	Apr 27	CONSERVATION COMMISSION.	The Missouri Conservation Commission not authorized under present Constitution and laws to adopt a retirement program for employees.
21-56	Mar 5	TOWN MARSHAL. COUNTY TREASURER. OFFICERS. COMPATIBILITY.	Offices of night marshal and county treasurer are compatible.
21-56	Apr 12	LINCOLN UNIVERSITY. AUTHORITY OF BOARD OF CURATORS. DALTON VOCATIONAL SCHOOL. LEASE OF SCHOOL PROPERTY.	The Board of Curators of the Lincoln University has, in the absence of funds to carry on the operation of the vocational school as such, the authority to lease Dalton Vocational School for one year to an independent public school district.

21-56	June 14	Hon. E. Gary Davidson	WITHDRAWN
22-56	Apr 11	PENITENTIARY. PRISONS. DEPARTMENT OF CORRECTIONS. CORRECTIONS. APPROPRIATIONS. LEGISLATURE. HOUSE OF REPRESENTATIVES. POWER PLANTS.	House Bill No. 1, 68th General Assembly, Special Session, as perfected, authorizes and permits the construction of a power plant at the Medium Security Prison for which such bill appropriates money.
22-56	Aug 10	Hon. Richard J. DeCoster	WITHDRAWN
24-56	Jan 20	GOVERNOR. DEPARTMENT OF CORRECTIONS.	Governor of State has no authority to create position of Administrator of Safety and Fire Prevention in absence of statutory or constitutional authority to do so.
24-56	Feb 23	ELECTIONS. COMMISSIONERS OF ST. LOUIS CITY CANNOT CHANGE CONGRESSIONAL DISTRICT BOUNDARIES.	Article III, Section 45 of the 1945 Missouri Constitution and Chapter 128 RSMo 1949 as amended by RSMo Cumulative Supplement 1955, pages 270 and 271, authorizes General Assembly only to subdivide state into congressional districts and change boundaries of same. Board of Election Commissioners of City of St. Louis cannot change boundaries of First and Third Congressional Districts in city.
24-56	Oct 31	ELECTIONS. ABSENTEE VOTING.	Closing of voter registration in City of St. Louis pursuant to Sec. 118.240 RSMo 1949 does not prevent execution of absentee ballot subsequent to such closing date. Canvassers of absentee ballots measure qualifications of such voters by registration law applicable to City of St. Louis, Chap. 118 RSMo 1949, saving an exception to those voting an official war ballot.
24-56	Nov 26	SPECIAL REGISTRATION. CITIES OF 600,000. NOTICE REQUIRED. WHO MAY REGISTER.	Under provisions of Section 118.240 RSMo 1949, St. Louis Board of Election Commissioners, in its discretion may hold special registrations at times and places other than board's office, for voters prevented by illness, physical disability, or other valid reasons from registering at board's office. Section requires previous notice of registrations and any notice, which in board's judgment, clearly advises prospective registrants of time and place or places, reasonable time in advance of registration is sufficient. Notice to be given to registrants only residing at place of registration. In holding registration at place or places, board shall register prospective registrants residing there and is not required to open place or places to public, or to register any other persons who

			present themselves.
27-56	Sept 6	Hon. John S. Eskeles	WITHDRAWN
31-56	June 8	OFFICERS.	Offices of county treasurer of Third Class county and treasurer of Fourth Class city not incompatible and may be held by same person.
31-56	Oct 19	CRIMINAL LAW. FALSE PRETENSES.	No conviction can be obtained under Section 561.450, RSMo 1949, for giving a check on a bank in which there is no account for a past due debt. Conviction can be had under Sections 561.460, RSMo 1949, and 561.470, RSMo 1949, for giving a check on a bank in which the maker has no account.
32-56	Apr 13	Hon. Edward W. Garnholz	WITHDRAWN
32-56	Oct 15	LIQUOR. LICENSEE. LIABILITY.	An illegal sale of intoxicating liquor to a minor by an agent with the knowledge and consent of the licensee renders the licensee as well as the agent liable.
33-56	June 15	Hon. C. L. Gillilan	WITHDRAWN
33-56	Sept 26	WORKMEN'S COMPENSATION.	An application filed with the Workmen's Compensation Commission against a self-insuring company or corporation, which states that the individual filing such application was a former employee of such company or corporation and that he was unjustly discharged from such employment because he had filed a claim for compensation, and was forced to sign a statement that he was being discharged for inefficiency, does not state sufficient grounds for revoking the self-insuring privilege of such company or corporation by the Workmen's Compensation Commission.
35-56	Apr 5	COUNTY WELFARE OFFICE. COUNTY COURTS.	Section 207.060, RSMo 1949 authorizes the county court to exercise its discretion as to whether or not county funds, services or quarters shall be contributed for support and maintenance of county welfare office; as well as amount and frequency of funds contributed. Fund contributions shall be paid to State Collector of Revenue and not to personnel of county welfare office.
35-56	Sept 13	ANIMALS. RUNNING AT LARGE.	Criminal prosecution will lie against the owner of horses, mules, asses, cattle, hogs, sheep and goats when the owner knowingly and purposely refuses to restrain such animals from running at large and when for any reason such animals' infirmity would render valueless the law providing for the sale thereof in such townships as have voted to have the stock law applied to the above enumerated animals.
35-56	Nov 1	COURT REPORTERS. REPORTERS.	Sullivan County is required to pay its proportionate share of the expenses of the court reporter incurred in traveling to and attending

			court in Chariton County where such reporter does not reside in the latter county.
37-56	Feb 16	Hon. C. R. Hardy	WITHDRAWN
37-56	Mar 12	GENERAL ASSEMBLY. LEGISLATURE. SPECIAL SESSION. GOVERNOR. GOVERNOR'S CALL FOR SPECIAL SESSION.	The Constitution prohibits action by the Legislature in Special Session on a proposed constitutional amendment, the subject of which is not included in the Governor's call for such Special Session, or in any special message of the Governor to such Special Session.
37-56	Mar 30	LEGISLATURE. LEGISLATIVE COMMITTEES. COMMITTEES. GENERAL ASSEMBLY. SPECIAL SESSION OF THE LEGISLATURE. CONSTITUTIONAL LAW.	Committees may be appointed to function during Special Session of the Legislature only as to matters within the call of the Governor or any special message of the Governor. Such committee may be created by resolution of one house and expenses thereof paid in the normal manner and from the usual funds.
37-56	Apr 10	ELECTIONS.	The state would not be liable for the cost of conducting the election on the school foundation bill and cigarette tax in a county wherein a vacancy in the office of state representative is filled in the same election.
37-56	June 27	CHIROPODY EXAMINATION.	It would not be lawful for the State Board of Chiropractic to accept the examination of the National Board of Chiropractic Examiners as a written examination given by the State Board and in lieu of such an examination by the State Board.
37-56	Sept 21	APPROPRIATIONS. MISSOURI STATE PENITENTIARY.	Section 13850 of House Bill 588 of the 68th General Assembly appropriates funds chargeable to Post War Reserve Fund to Missouri State Penitentiary for making additions, repairs and replacements, for constructing and equipping industrial buildings. Appropriation can only be used for purposes authorized, no part of same can be used to erect a barn on State Church Farm.
38-56	Oct 19	WORKMEN'S COMPENSATION. STATE IS AN EMPLOYER. EXEMPTED EMPLOYMENTS. DEPARTMENT OF	Legislative action necessary to give Department of Corrections authority to accept Missouri's Workmen's Compensation Law. Director of Department of Corrections, and Department of Corrections, which are created by the legislature, have no authority to accept Missouri's Workmen's Compensation Law.

		CORRECTIONS.	
39-56	Feb 14	PROBATE COURT. DESIGNATION OF SESSIONS IN COURT RECORDS. SHERIFF'S FEES. POSTAGE FEES.	A session or non-regular session during a term is not a session in vacation; sheriff is entitled to fees only on days court is in session. Letters testamentary may be granted even though the court is not in session. Fees for mailing notices are to be remitted to the state. Collections made for postage actually expended may be retained by the county.
39-56	Feb 27	CITIES. TOWNS. VILLAGES. PETITION FOR INCORPORATION. SIGNATURE. WITHDRAWAL OF SIGNATURES.	(1) Under Section 80.020, RSMo 1949, a taxable inhabitant who may petition for the incorporation of a town is one who has attained his majority and owns property located within the boundary of the proposed town which is subject to taxation. (2) The county court must be satisfied that a village or town actually exists and that the lands included therein have a reasonable relation to such village for a petition for incorporation to be reasonable. (3) Those who have signed a petition for incorporation may withdraw their signatures at any time before hearing is held by the county court to determine if the petition bears the signature of a sufficient number of qualified inhabitants.
39-56	Apr 24	MOTOR VEHICLES. DRIVER'S RESPONSIBILITY LAW. COUNTIES. BONDS.	County court may not deposit county funds as security for county employee to retain his driving license.
39-56	Oct 26	ELECTIONS. VOTERS. ABSENTEE BALLOTS. REGISTRATION OF VOTERS.	In cities of ten thousand, person must be registered in order to be eligible to case absentee ballot.
40-56	Jan 12	ST. LOUIS. CONSTITUTIONAL LAW CITY CHARTER.	A charter adopted by St. Louis City under provisions of Sec. 32(b) of Article VI of the constitution cannot include provisions for eliminating or changing the method of selecting officers to fill "county offices".
40-56	Mar 2	UNIFORM SUPPORT OF DEPENDENTS ACT.	A Prosecuting Attorney should represent the plaintiff in any proceeding under the Uniform Support of Defendants Law in his county, whether such plaintiff resides in his county or in another state, upon, and only upon, the request of the court in which such proceeding is lodged or of the state division of welfare to do so.
40-56	Mar 12	INTOXICATING LIQUORS.	Railroad licensees must purchase from Missouri wholesalers and under price posting law.
40-56	Mar 14	SCHOOLS. SCHOOL DISTRICTS. TAXATION.	School district which did not levy at least one dollar for school purposes in 1955 does not qualify for state aid in current school year under Senate Bill No. 3. Amounts previously paid may be deducted

			from apportionment for following school year.
40-56	Mar 30	CITIES, TOWNS AND VILLAGES.	Described financial statement does not meet requirements of Section 79.160 RSMo 1949.
40-56	June 27	ELECTIONS. ABSENTEE BALLOTS. APPLICATION. HOW MADE.	Qualified elector expecting to be absent from his county, or prevented because of illness or physical disability from voting in regular way at home precinct on election day, may apply to county clerk or other officer required to furnish ballots, for absentee ballot within time and manner provided by Sections 112.020 and 112.030, RSMo 1949. Application can be made personally by elector, or by written application sent first class mail, but application cannot be made or sent by elector's agent.
40-56	Oct 19	COUNTY COURT. ELECTIONS. POLLING PLACES.	County court not authorized to submit question of relocating polling places to voters at general election in 1956.
41-56	Jan 11	DELINQUENT TAXES. LAND SALE. INNOCENT PURCHASER. RECOVERY OF PURCHASE PRICE AND TAXES.	An innocent purchaser of land at a tax sale for delinquent taxes, which sale is held by mistake of the collector, can recover the purchase price of the land and the total sum of any taxes which he may have paid upon the land.
41-56	Apr 18	CITIES. BOARD OF ALDERMEN. POWERS OF BOARD OF ALDERMEN. FUNCTIONS OF CITY. MONEY IN THE GENERAL FUND. CITY HALL. PLAYGROUND SITE.	(1) A fourth class city, through its board of aldermen, may purchase land to be used for a city hall or playground site. (2) The money in the general fund may be used in payment for such lands.
41-56	May 10	CITIES OF THE FOURTH CLASS. SURPLUS WATERWORKS FUNDS.	Surplus funds of a waterworks system of a city of the fourth class may be invested in government bonds or placed on time deposit in a depository.
41-56	July 12	COUNTIES. COUNTY COURTS. LEGAL PUBLICATIONS.	The compensation to be allowed to the editor of the newspaper for publishing a county financial statement would be governed by the rates specified in Section 493.030 RSMo Cum. Supp., 1955, unless a lesser amount was otherwise agreed upon.

41-56	Aug 2	Hon. Haskell Holman	WITHDRAWN
41-56	Aug 20	SCHOOLS. SCHOOL DISTRICTS.	School board may pay teacher only salary specified in contract for services encompassed by contract; board may make separate agreement for other services not included within scope of teaching contract; salary schedule may be included in teacher's contract and must be made part of contract to be effective.
41-56	Aug 27	COURT REPORTER. REPORTER.	One-fourth of the compensation allowed to be temporary court reporter, under the provisions of Chapter 485 RSMo Cum. Supp., 1955, is payable out of the state treasury. The state's part of the compensation allowed to a temporary court reporter is in addition to the amount that the state is obligated to pay the regular court reporter.
41-56	Sept 13	SCHOOL BONDS. BUILDING FUND. INTEREST FUND.	Section 165.110, Mo. Cum. Supp. 1955, provides that the money received from the sale of building bonds should be placed in the building fund, whether the money received in exchange for the bonds is the par value of the bonds, below par, or above par.
41-56	Nov 28	COURT REPORTER. REPORTER.	The state's portion of the compensation due a temporary court reporter should not be computed on a basis of so much per day, but should be computed on the same as the compensation authorized the regular court reporter.
41-56	Dec 7	MISSOURI REAL ESTATE COMMISSION.	A real estate licensee does not jeopardize his license under Section 339.100, Clause 11, RSMo 1949, when he sells houses of a manufacturer, even though that manufacturer is conducting contests, and presenting as prizes, free houses and lots.
41-56	Dec 7	MISSOURI REAL ESTATE COMMISSION.	Licensees selling real estate in connection with which a contest is being held are not jeopardizing their licenses if contest is not for the purpose of influencing purchasers or prospective purchasers of real property.
42-56	June 21	SUPPLEMENTAL UNEMPLOYMENT BENEFIT PLAN.	(1) The receipt of supplemental benefits under the Ford Motor Company or General Motors Corporation Supplemental Unemployment Benefit Plan does not prevent the receipt of state unemployment benefits to an individual while unemployed. (2) The amounts which are set aside to pay supplemental benefits under this plan are not taxable as wages under Section 288.090, RSMo 1955, Supp.
43-56	Jan 11	Hon. Harold S. Hutchison	WITHDRAWN
43-56	May 22	MISSOURI HIGHWAY COMMISSION. PROFESSIONAL ENGINEERS AND	Professional engineers not registered as land surveyors cannot make surveys for said Commission. Professional engineers employed by said Commission may make surveys for Commission without necessity of registering as land surveyor.

		SURVEYORS.	
44-56	June 25	TOWNSHIP ORGANIZATION COUNTIES. COUNTY HIGHWAY ENGINEER. ROADS.	1. In township organization county the county court must have approval of county highway engineer in establishing or changing a road. 2. In township organization county the county court must have approval of county highway engineer in vacating a road.
45-56	Jan 31	ELECTIONS. CENSUS. CITIES.	Under Section 113.530, RSMo 1955 Supplement, the Jackson County Board of Election Commissioners will conduct elections in the city of Raytown, which according to a census taken by the city has a population of 11,700.
46-56	Feb 20	COMPATIBILITY OF OFFICES. CORONER AND MAGISTRATE.	Magistrate cannot hold both offices of magistrate and coroner at the same time for the reasons the duties are incompatible, each with the other.
46-56	Mar 6	LIBRARIES. CITY LIBRARIES. CONSTITUTIONAL LAW. OFFICERS.	Provision limiting term of members of board of trustees of city library applicable to incumbents as well as those elected to board in future for first time.
49-56	Jan 27	MAGISTRATE COURTS. COSTS.	The court is authorized to require a reasonable deposit or security for costs.
49-56	Mar 8	COUNTIES. TAXATION. STATE TAX COMMISSION. INCREASE OF ASSESSMENT. ASSESSMENTS.	Increase of ten per cent or more in assessed valuation of a county made pursuant to order of the State Tax Commission before the county court finally sets the tax rate does not bring into operation the provisions of Section 137.073, RSMo Cumulative Supplement 1955.
49-56	June 11	COURT REPORTERS. FEES.	Construction of Section 485.100, MoRS Cum. Supp. 1955. Time when official court reporter may submit bill for making up a transcript requested by the court on an appeal by a poor person. When state or county is liable for such costs. Procedure for reimbursement to county by state when liability is that of state.
50-56	Jan 27	MOTOR VEHICLES. ABANDONMENT.	In order to constitute abandonment of property, the owner must voluntarily abandon with no intention of retaking.
50-56	Feb 17	ENGINEER. COUNTY ENGINEER.	A county court would be justified in paying a county engineer for county work done by the engineer on holidays and Sundays.

51-56	May 24	TOWNSHIPS. OFFICERS. PUBLIC OFFICERS. SALARY. COMPENSATION OF OFFICERS.	Township trustee and members of the township board elected before the effective date of Section 65.230 RSMo 1955 Cum.Supp., may not receive the increased compensation authorized therein during their present term of office. Officers whose terms began after said Act took effect may receive the increased compensation.
51-56	June 13	CRIMINAL COSTS.	1. Fees of witnesses for a defendant who has taken an appeal as a poor person are not paid by the state or county. 2. Fees of rebuttal witnesses used by the state, whose names have not been endorsed upon the information, are taxable against the state where the prosecuting attorney in writing orders subpoenas to be issued to them and when the prosecuting attorney shall file an affidavit that witnesses ordered by him are necessary to a complete adjudication of the case.
52-56	Mar 7	INSURANCE.	Insurance companies subject to Sections 379.205 to 379.310 RSMo 1949, are not exempt from the provisions of Section 376.400 RSMo 1949 when issuing regular accident and health policies, and such companies may include a death benefit payment in comprehensive automobile casualty and liability policy without making such policy a regular accident and health policy required to be filed and approved under Section 376.400, RSMo 1949.
52-56	May 4	INSURANCE.	Articles of Incorporation of Consumers Life Insurance Company.
52-56	July 24	INSURANCE.	Articles of Incorporation of Automobile Owners Association Insurance Company.
52-56	Aug 1	INSURANCE.	Proposed Death Benefit Plan of V.F.W. involves transacting life insurance business, and licensing provisions of Missouri Insurance Code must be met.
52-56	Nov 15	INSURANCE.	Articles of Incorporation of Heuer-Williams Mutual Insurance Company.
53-56	Jan 10	ELECTION. COURTS. CAPE GIRARDEAU COURT OF COMMON PLEAS. NOMINATIONS.	Special election to fill vacancy in office of judge of Cape Girardeau Court of Common Pleas may be called for any time at discretion of Governor; not less than ten days' notice to be given; candidates may be nominated by party judicial committees or by petitions of nomination; election to be conducted under Chapter 111, RSMo 1949.
53-56	Mar 1	Hon. Stephen N. Limbaugh	WITHDRAWN
53-56	Mar 12	COUNTIES. STATE PARK BOARD.	Conveyance by county to State Park Board is supported by adequate consideration where Park Board agrees to maintain and develop land as a part of the state park system.

58-56	Apr 30	DRAINAGE DISTRICTS. COUNTY. TAX BOOKS.	The making up of the tax books of a drainage district organized in the county court of any county in Missouri, under Chapter 243, RSMo 1949, and the entries to be made in such tax books by the county clerk should be in conformity to the directions in subsection 2 of Section 243.350, Laws of Missouri 1953, pages 538, 539.
59-56	Mar 1	COUNTY COURTS. SCHOOL DISTRICTS. ASSESSMENTS.	(1) The valuation of government- owned lands for purposes of apportioning moneys to school districts is to be made by the county court as is provided in the first sentence of Section 12.100 Cum. Supp. 1955. These lands are to be evaluated by the county court as if they were privately owned. (2) The amount of land to be assessed depends upon the particular district. As to any district entitled to apportionment of these moneys, the amount of land to be assessed shall be the amount that the district could have assessed but for the acquisitions of the land by the government. (3) Any district which would have had land to assess but for the acquisition of these lands by the government is entitled to apportionment. This includes any reorganized district which is now composed of any district or any part of any district that could have assessed the land but for the acquisition thereof.
59-56	Mar 19	WAIVERS OF PRELIMINARY HEARINGS. WAIVERS OF WRITTEN RECORD OF WITNESSES' TESTIMONY. WAIVER OF WITNESSES' SIGNATURES.	(1) A defendant may waive his right to a preliminary hearing under Sec. 544.250 RSMo 1949, and Supreme Court Rule 23.02 RSMo 1955, in any criminal proceeding. (2) A defendant may waive the written record and signatures referred to in Sec. 544.370 RSMo 1949, and Supreme Court Rule 23.12 RSMo 1955.
59-56	Sept 20	SCHOOLS. SCHOOL DISTRICTS. TAXES.	In the event the assessed valuation of real or personal property is increased by the action of the assessor by ten per cent or more over the prior year's valuation and such increase is permitted to stand by the action of the county board of equalization and the State Tax Commission, it is the duty of the various school boards of the county to adjust the tax rates in accordance with and by virtue of the provisions of Section 137.073, RSMo Cum.Supp. 1955.
59-56	Nov 20	TAXATION. PUBLIC PROPERTY. TAXATION OF PROPERTY HELD BY CHARITABLE CORPORATION. LIABILITY OF	Persons owning realty on January 1 of each year are liable personally for the tax thereon for the following tax year. Land against which taxes are levied and assessed while under private ownership becomes immune from proceedings to enforce the tax lien and collect those taxes when title to said land is transferred to the State of Missouri. A cotenant is liable only for the taxes on his individual undivided interest and not for taxes due on undivided interests of fellow cotenants.

		TENANTS IN COMMON FOR TAXES.	
60-56	May 4	SCHOOLS.	A regulation passed by a school board stating that no child could enter the first grade unless he became six years of age prior to September 15th is not a denial of his legal right and is not unreasonable.
60-56	June 12	Hon. Lewis M. Means	WITHDRAWN
62-56	June 14	SCHOOLS. ELECTIONS.	Statutory common school district meeting may adjourn promptly upon completion of official business.
62-56	Sept 18	ELECTIONS. WRITE-IN AT PRIMARY. WHEN POLITICAL COUNTY COMMITTEE CAN FILL VACANCY.	Names of persons written in on primary ballot should not be placed on ballot at official election; that Section 120.550, Mo. Cum. Supp. 1955, authorizes party committee to fill vacancy when candidate dies or resigns before primary but after last day in which any other party may file; that same section does not authorize committee to fill vacancy when no one files; and that same section does not require party committee to fill vacancy before primary.
63-56	Jan 20	Hon. J. Whitfield Moody	WITHDRAWN
63-56	May 31	MOTOR VEHICLE. DRIVER'S LICENSE. CONVICTION.	A driver's license may not be revoked or suspended for one conviction of careless and reckless driving although party may have been guilty of careless and reckless driving resulting in the death of another.
63-56	Sept 24	ANIMALS. MISSOURI STOCK LAW.	A township may hold an election as to whether the stock law is to be retained in such township even though the township has previously voted to adopt the stock law or even though the county in which the township is located has had such an election, has voted to adopt the stock law. Also, once a county has voted to adopt the stock law, there is no authority for it to again vote upon the same issue.
64-56	Jan 20	TAXATION. CIGARETTE TAX.	Cigarette tax collections should be deposited in state treasury pending outcome of litigation regarding its constitutionality.
64-56	Apr 9	EDUCATIONAL AND RELIGIOUS CORPORATIONS. EXEMPTION FROM TAXATION. PROPERTY INCAPABLE OF DIVISION.	(1) The real estate owned by the Belin Memorial University is exempt from taxation to the extent that it is used exclusively for educational and religious purposes. (2) Any property now being used exclusively for religious and educational purposes which subsequently may be used otherwise, will become subject to taxation upon such use. (3) Only the property which is used otherwise than for religious and educational purposes is subject to taxation, except that property incapable of division, some of which is used exclusively for religious and educational purposes and some of which is used otherwise, is taxable in its

			entirety.
64-56	July 11	MUNICIPALITY. BONDS. SECRETARY OF STATE.	Bonds issued by municipalities of Alabama under Act of General Assembly of Alabama, 1956, not subject to registration in this state under Section 409.040, RSMo 1949.
66-56	May 31	DEPARTMENT OF CORRECTIONS. DENTAL CARE TO INMATES.	Statute placing general supervision over care of inmates implies the responsibility to furnish dental care.
66-56	Oct 10	STATE PURCHASING AGENT. DIVISION OF PROCUREMENT.	The failure of a department to make such reports as are required by law would not relieve the State Purchasing Agent from his duty of maintaining a current inventory of removable property owned by the state. Further, the duty to maintain such inventory does not extend to removable property purchased by those departments not subject to the State Purchasing Agent's Act, and obtained under such exemption.
68-56	Jan 20	REFUSE DISPOSAL AREA. JUNK DEALERS. SALVAGE YARDS. LICENSE.	A junk dealer who operates a salvage or junk yard would not be obliged to procure a license to operate a refuse disposal area, and a dealer who operated a used-car salvage supply lot will not be obliged to procure a license to operate a refuse disposal area.
68-56	May 31	SURVEYORS.	A person who is not registered with the state board of registration for architects and professional engineers as a land surveyor may not lawfully practice, advertise or indicate to the public that he is engaged, or will engage, in land surveying; such a person may offer for recordation any papers relating to land surveying prepared by him prior to the effective date of the act; a paper prepared, signed and sealed by a person registered as a "registered professional engineer" may not be accepted for recordation, unless such person is an employee of the state.
68-56	Nov 28	ELECTIONS. COUNTY CLERK.	The county clerk in canvassing returns of an election cannot go behind the return unless, upon a comparison of the poll books and tally sheets, there is found a discrepancy, then he shall issue a certificate of election to the candidate receiving the highest number of votes as shown by the tally sheets.
69-56	May 25	PUBLIC RECORDS. PROBATE COURT. COUNTY COURT.	Assessment lists in custody of county court may be destroyed when in compliance with provisions of Section 109.150, MoRS Cum. Supp. 1955. School enumeration lists cannot be destroyed and only the vouchers and receipts in any estate filed in probate court may be destroyed and then only in compliance with the provisions of Section 472.280, Subsection 2, MoRs Cum. Supp. 1955.
69-56	May 31	Hon. James L. Paul	WITHDRAWN

69-56	June 25	MISSOURI STATE PARK BOARD. TITLE. REAL ESTATE.	Missouri State Park Board unauthorized to acquire right of way easement from Highway 66 to Meramec State Park.
69-56	Sept 24	TAX SALE. LAND SOLD FOR TAXES. REDEEM – WHO MAY.	Owner may redeem land sold for taxes. Occupant or person may redeem, if transfer may affect their rights; and agent of record owner may redeem if he has authority to redeem. Stranger to land cannot redeem.
70-56	June 4	Hon. Richard K. Phelps	WITHDRAWN
70-56	Oct 22	TAXATION. EXEMPTION OF HOUSEHOLD GOODS.	Sec. 137.120, RSMo 1949, providing that an assessment list shall contain a statement of each piano, other musical instruments, radios, clocks, watches, chains and appendages, sewing machines, washing machines, refrigerators, gold and silver plates, jewelry, household and kitchen furniture of person assessed, if repealed will not thereby exempt such personal property from taxation. All laws attempting to exempt such personal property from taxation not owned by this state, any county or other political subdivision or nonprofit cemeteries, and held for profit and is not used exclusively for religious worship, schools and colleges, for purely charitable or for agricultural and horticultural societies, are in violation of Art. X, Sec. 6, Const. of Mo., and such laws are void.
72-56	Apr 11	COUNTY COLLECTOR. COMPENSATION. TAXATION. COUNTIES. COMMISSIONS. COLLECTOR. DRAINAGE DISTRICTS.	County collector of second class county charges commissions for collection of current taxes and drainage district taxes and pays such commissions to county treasury.
72-56	May 16	STATE LIBRARIAN. MAY HOLD STATE LIBRARY MEETINGS AND DISTRICT LIBRARY INSTITUTES.	State librarian authorized under provisions of Section 181.030 RSMo 1949 to hold State library meetings and district library institutes referred to in Section 182.110 RSMo Cumulative Supplement 1955.
72-56	June 7	SCHOOLS. SCHOOL DISTRICTS.	Where extended boundary lines of two school districts intersect at a point so that districts touch, they “adjoin” within the meaning of Sec. 165.300, RSMo 1949, so that one may be annexed to another.
72-56	Nov 2	COUNTY LIBRARIES. TAXATION.	1. Delinquent taxes collected for a public library during any fiscal year are to be counted in determining if tax income for such year yields one

		STATE AID.	dollar or more per capita according to latest Federal census so that Library is eligible for State aid in accordance with second standard of Subsection 2 of Section 181.060, Cumulative Supplement 1955. 2. That if tax rate voted for a public library is one or more mills and rate collected is less than one mill, but such tax income yields one dollar or more per capita for previous year, according to population of latest Federal census, as provided by second alternate standard of Subsection 2, Section 181.060 Cumulative Supplement 1955, such library is entitled to State aid.
72-56	Dec 5	LEGISLATIVE RESEARCH COMMITTEE.	Legislative Research Committee cannot validly pay out of the general appropriation fees of attorneys employed by it to render legal opinions on Attorney General's opinion, nor of secretaries assigned to these attorneys. Has no authority to pay costs or attorney's fees in a lawsuit filed by a state senator attempting to collect payment of expenses he claims he is entitled to receive for attending Senate Committee Meetings.
73-56	Jan 5	STATE MENTAL HOSPITALS. PERSONAL PROPERTY OF INMATES. DISPOSITION.	In a situation where a patient leaves a mental hospital on discharge or convalescent leave, and leaves in his personal account at the hospital unclaimed funds, there is no existing means by which any disposition can be made by the hospital of these funds. Further, in a situation where a patient in a state mental hospital dies, or leaves the state mental hospital on convalescent leave or discharge and in either situation leaves at the state mental hospital personal property which is unclaimed, such property may become the property of the state hospital as "abandoned property," in those cases where the fact situation brings the property within the purview of the law holding property to be abandoned.
75-56	Apr 6	VOTER REGISTRATION.	All unregistered residents of Joplin are required to register before being eligible to vote, in primary and general elections, regardless of the county in which such city residents may reside.
75-56	Sept 24	Hon. James T. Riley	WITHDRAWN
77-56	Dec 10	STATE VETERINARIAN. VETERINARY BOARD. AGRICULTURE.	A person is entitled to a non-graduate license to practice veterinary medicine only if such person has, for each year during the twenty years immediately preceding the effective date of Section 340.040 RSMo Cum. Supp. 1955, made the greater percentage of his income from the treatment of animals, and who has resided in the same town or community during said period.
78-56	Mar 15	ELECTIONS. COUNTIES.	Registration lists or cards in counties having more than 200,000 inhabitants and less than 450,000 inhabitants are public records and subject to inspection by the public.
79-56	Mar 15	LEGISLATIVE RESEARCH COMMITTEE.	Legislative Research Committee cannot validly pay out of the general appropriation fees of attorneys employed by it to render legal opinions on Attorney General's opinion, nor of secretaries assigned to these attorneys. Has no authority to pay costs or attorney's fees in a lawsuit filed by a state senator attempting to collect payment of expenses he claims he is entitled to receive for attending Senate Committee Meetings.

81-56	Feb 24	STATE TRAINING SCHOOLS. APPROPRIATIONS.	Any money appropriated for the State Training School at Tipton should not be paid to the State Training School at Chillicothe, after the transfer of the inmates of the Tipton School to the School at Chillicothe. Also, the \$15.00 per month paid to the various schools by the county from which the inmate comes, should, after the transfer of the inmates of the Tipton School to the School at Chillicothe, be paid to the Chillicothe Institution for each transferee from the Tipton School.
81-56	June 12	ANIMALS. DOGS. COONS. COON ON A LOG. BAITING OF ANIMALS.	"Coon on a Log" constitutes baiting in violation of Section 563.660 RSMo 1949.
82-56	May 7	POLICEMEN. "OFFICERS". MERIT SYSTEM POLICE DEPARTMENT. RESIDENCE AND VOTING REQUIREMENTS OF OFFICERS.	A chief of police under the Merit System Police Department is an officer under Section 77.400 RSMo 1949, and, consequently, would have to comply with the provisions of Section 77.380 RSMo 1949.
82-56	May 31	COUNTY TREASURER. ELECTION REQUIREMENTS UPON A CHANGE OF COUNTY CLASSIFICATION.	Notwithstanding the requirement in a class 2 county that a treasurer shall be elected in 1948 and every four years thereafter, the county treasurer in a class 2 county elected in 1954, when the county was a class 3 county, is entitled to hold office until the end of 1958 and until her successor is elected or appointed and qualified.
82-56	July 25	CONSTRUCTION OF SECTION 415.050 RSMO 1949.	No criminal prosecution will lie against a person, company, or corporation for using the word "storage" in their advertisements even though such person, company, or corporation is not engaged in the storage business and is not licensed as a warehouse.
83-56	May 7	CIVIL DEFENSE. WORKMEN'S COMPENSATION.	Volunteer workers in civil defense not "employees" within the meaning of Workmen's Compensation law.
84-56	June 11	PROBATE COURT. PUBLICATION OF NOTICE.	In specifying the date in a notice for hearing on petition for sale by probate court, the date must be fixed not later than seven days after twenty-eight days following the date of the first publication of notice.
86-56	June	PROBATE COURTS.	Sec. 472.040 RSMo 1949, Cum. Supp. 1955 prescribes rules for taxing

	21		costs in probate proceedings. Costs properly taxed against estate with insufficient funds not collectable. Fees taxable under Sec. 483.580 RSMo 1949 in counties of less than 30,000 inhabitants and remaining unpaid for one year after being reported under said statute are to be collected by State Director of Revenue. Fees accruing under Sec. 483.580 RSMo 1949 are to be collected from estate or from persons requiring services named in statute. Failure of executors and administrators to pay costs properly taxed necessitates looking to official bonds for collection.
86-56	Oct 3	COUNTIES. COUNTY COURT. DISPOSAL AREAS.	County Court may not rescind order entered under Section 64.483, making County Option Dumping Ground Law operative within its county.
87-56	Apr 23	PROBATE CODE. EXECUTORS AND ADMINISTRATORS. EMPLOYMENT OF ATTORNEY.	Effect of new probate code law as to attorneys and executors or administrators in the administration of an estate.
89-56	Feb 23	SECRETARY OF STATE. POWER OF SECRETARY OF STATE. FLAG OF MISSOURI. GREAT SEAL OF MISSOURI.	The Secretary of State of Missouri does not have the authority to grant permission for the use of the Flag or Great Seal of Missouri to any of the following: (1) Private firms for commercial purposes (2) Fraternal, benevolent and other nonprofit organizations for noncommercial purposes (3) Candidates for political office.
89-56	Feb 28	OFFICERS. DEPUTY CIRCUIT CLERKS AND EX OFFICIO RECORDERS. FOURTH CLASS COUNTIES. APPOINTMENT. QUALIFICATION. COMPENSATION.	By proceeding in nature of quo warranto the Supreme Court of Missouri found Elvis Mouser had usurped the office of Circuit clerk and recorder of Bollinger County, Missouri since January 8, 1955, and ordered him ousted from office and emoluments as of that date; that Mrs. Medford J. Taylor was the legally appointed and qualified clerk as of said date. Mrs. Juanette Wagner is the legally appointed and qualified deputy of Mrs. Taylor and is entitled to receive monthly compensation fixed in the circuit court's order approving appointment on January 10, 1955 from said date as long as she is so employed.
89-56	June 26	APPROPRIATIONS. PUBLIC PRINTING.	Expenses incident to the publication of Constitutional Amendment No. 1, voted upon January 24, 1956, and not covered by the provisions of Section 12 of House Bill 5 (Special Session), may be paid from funds available for printing under the provisions of Section 4.130 of House Bill 4, adopted by the 68th General Assembly.
89-56	Oct 19	SCHOOLS. SCHOOL DISTRICTS.	When school site is abandoned and land reverts to original grantor, school district in removal of buildings not obligated to remove foundation stones, to fill basements, pump pits, etc. Board in six-director district without authority to lease lands or buildings for private

			purposes for gain.
90-56	Apr 18	MERCHANT'S TAX. TAXATION. NURSERIES.	Owners of plant nurseries who maintain sales facilities on the nursery premises and who do not have a regular stand or place of business away from such premises are not merchants subject to the merchant's tax as provided in Section 150.040, RSMo 1949.
90-56	May 22	SCHOOL ELECTION. BALLOT. NOTICE OF ELECTION.	(1) All propositions to be voted on may appear on one ballot under Section 165.330, Cum. Supp. 1955. (2) Only the levy which was not properly advertised need be resubmitted for a vote. Neither the levy for the building fund nor the election of board members need be resubmitted to a vote. (3) The election of board members would not be void where only one blank space was provided for two write-in candidates. (4) That part of the election, which is in compliance with the requirements of the law, is valid irrespective of the fact that other parts of the election are invalid.
90-56	July 12	COUNTY BOARD OF EQUALIZATION. STATE TAX COMMISSION. TAXATION.	In the event a county board of equalization raises the assessed valuation of properties within the county, notice of such action should be given to the person owning or controlling the property affected, in person or by mail, if the address is known, and valid notice by publication can only be effected where the address of such person or persons is unknown. Further, in performing their duties in regard to intracounty equalization, the county board of equalization must maintain the aggregate assessed valuation as previously fixed and determined by the state tax commission.
90-56	July 30	ELECTIONS.	Persons registered under old law may vote at primary in Jackson County in 1956.
92-56	Feb 24	TRANSPORTATION. INTOXICATING LIQUOR.	The moving of intoxicating liquor for even a very short distance constitutes "transportation" as that word is used in Section 311.410 RSMo 1949.
93-56	Jan 31	MOTOR VEHICLES. ROADWAYS. PLACE OF DRIVING.	A motorist who operates a motor vehicle upon a one-way roadway in such a manner as to endanger the life or property of others may be prosecuted therefor.
93-56	Mar 1	COUNTY COURT. FLOOD CONTROL ACT.	After allocating federal flood control funds to schools and for roads, county court may exercise discretion in using balance for any proper county purpose.
93-56	Apr 2	COUNTIES. CLASSIFICATION OF COUNTIES. MUNICIPALITIES. CITIES. POLICE.	The City of St. Louis is not a city in a county of the first class within the provisions of Section 86.400 RSMo Cumulative Supplement, 1955.

		POLICE RETIREMENT SYSTEMS. FIREMEN. FIREMEN'S RETIREMENT SYSTEMS. FIRE DEPARTMENTS.	
93-56	Aug 27	NEPOTISM.	School director voting to appoint one to fill vacancy on board of which he is a member; appointee being stepson of director's wife's uncle; there is no relationship between director and appointee within fourth degree either by consanguinity or affinity and director does not violate nepotism provision of Art. 7, Sect. 6, Constitution of Missouri 1945, and does not forfeit office.
93-56	Sept 17	NEPOTISM.	A school board member is not related in fourth degree, either by consanguinity or affinity, within meaning of Art. VII, Sec. 6, Const. of Mo., 1945, (1) to a bus driver of district whose wife is first cousin of board member's wife or (2) to a bus driver of district who is brother-in-law of wife of board member.
94-56	June 4	HIGHWAY COMMISSION. TRESPASSING. SURVEYS.	State Highway and its agents not liable for trespassing when entering upon private property for purpose of making preliminary survey.
96-56	Feb 17	SCHOOLS. SCHOOL DISTRICTS. STATE SCHOOL MONIES.	Institutions of higher learning ineligible for apportionment of state school money under Senate Bill No. 3 or House Bill No. 182, 68th General Assembly.
96-56	Mar 22	SCHOOLS. SCHOOL DISTRICTS. ELECTIONS.	When because of extension of city limits boundaries of city school district are extended, respective boards of education may adjust and apportion property and liabilities of districts prior to July 1. Qualified voters in area so annexed to city district may vote in city district at April election following decree or vote extending city limits.
96-56	Apr 18	BOARDS OF EDUCATION. SCHOOL DISTRICTS. ANNEXATION OF DISTRICTS. TRANSPORTATION OF SCHOOL CHILDREN.	Boards of education are authorized under Section 165.303, RSMo 1949, to transport pupils from territory annexed prior to, as well as subsequent to, the effective date of this section.
96-56	Apr 26	Mr. Hubert Wheeler	WITHDRAWN
96-56	May 10	SCHOOLS.	Children residing on federal lands comprising Fordland Air Force Station

		SCHOOL DISTRICTS. CONSTITUTIONAL LAW.	may attend school in school district within which such lands lie and attendance may be counted in apportioning state aid.
96-56	June 1	AUTHORITY OF COUNTY BOARD OF EDUCATION. AUTHORITY OF STATE BOARD OF EDUCATION. REORGANIZATION PLANS.	(1) A county board of education may withdraw a proposed plan of reorganization prior to the time the state board of education has acted thereon. (2) The State Board of Education is authorized to comply with a request of the County Board of Education to withdraw a proposed plan of reorganization.
97-56	June 4	TAXATION. TAX SALES. COUNTY COLLECTOR.	A publication of notice requisite to the sale of lands for taxes directed merely to the "heirs of" a certain person is insufficient and would render a sale based thereon invalid even though that was the method by which the owner was actually listed on the land tax book. In the event the proceeds arising as a result of an invalid sale are refunded to the purchaser out of the county general revenue fund the proceeds of a subsequent valid sale should be paid over to general revenue.
97-56	June 7	MOTOR VEHICLES. CRIMINAL LAW. INFORMATIONS.	Proposed information for violation of provisions of Section 304.010, MoRS 1949, sufficient to fully apprise the one charged of the offense committed.
97-56	Nov 9	MAGISTRATES. MOTOR VEHICLES. MOTOR VEHICLES OPERATORS' LICENSES.	Driver's license may be suspended as habitual reckless or negligent driver for conviction of two charges of reckless and careless driving within two years, even though one conviction occurred prior to effective date of re-enacted statute.
98-56	Mar 12	PUBLIC HEALTH & WELFARE, DEPT. OF. WELFARE, DIVISION OF.	Attorney for division may act as referee on appeals to Director of Department and may participate in hearings.
99-56	May 24	CONCEALED WEAPONS.	Sheriffs, deputy sheriffs, police officers, member of the highway patrol, town marshals, judges of courts, and all persons deputized by any of the above persons to aid in conserving the peace, or to serve criminal or civil process, are exempt from the provisions of Section 564.610. Further, that firearms capable of being concealed upon the person which were acquired prior to the enactment of the law requiring a permit before acquiring such firearms, does not apply to firearms so acquired prior to the enactment of the law. Further, the above section does apply to firearms acquired by Missouri residents in other states, or to firearms acquired by inheritance.

99-56	May 24	SOCIAL SECURITY. DEPUTY RECORDERS. COUNTY EMPLOYEES, WHEN.	Deputies and assistants to recorder of deeds , third class township organization counties, who are appointed and paid compensation under provisions of Sec. 59.250, Laws of Mo. 1953, p. 372, are “county employees” within meaning of Old Age and Survivors Insurance Law, Ch. 105, RSMo Cum. Supp. 1955, and Federal Social Security Laws, if county has sufficiently complied therewith to have employees covered. In such event, counties are liable for employers’ portion of tax required by Sec. 3111, Subchapter (b), Federal Insurance Contributions Act.
99-56	Aug 10	DOWER.	If a husband dies intestate a widow gets one-half of the lands of her deceased husband if the husband is survived by issue and if he died after January 1, 1956; under the new Probate Code dower which was not vested was abolished as of January 1, 1956.
99-56	Oct 23	PROBATE COURTS. CLERKS OF COURT.	In counties having more than thirty thousand and less than seventy thousand inhabitants, with an assessed valuation in excess of thirty million dollars, the county court may, where the need exists, provide such additional clerks, deputy clerks and other employees in the probate court as in its discretion it believes are required; and provide funds for the payment of salaries of such employees in addition to the amounts specified in Sec. 483.475 RSMo Cum. Supp. 1955.
99-56	Nov 5	Hon. Scott O. Wright	WITHDRAWN

SANITARY DRAINAGE
DISTRICT:
REVENUE BONDS:
SEWAGE DISPOSAL:



Chapter 248, RSMo 1949, authorizes the creation by the City of Kansas City, and parts of Clay, Platte and Jackson Counties, of a sanitary drainage district to carry domestic sewage only; this district is a political subdivision which may become indebted in an amount allowed by Section 26(b), Missouri Constitution, 1945.

February 15, 1956

Dr. James R. Amos
Director
Division of Health
Jefferson City, Missouri

Dear Dr. Amos:

This will refer to your request for an opinion of this office, which request is as follows:

"Recently there has been activity toward the development of a metropolitan sewer district in the Kansas City area. Interest in such a metropolitan approach to the sewerage problem has been expressed by officials in Clay, Platte and Jackson Counties. The Division of Health has encouraged such an approach. Interest has also been expressed in the Kansas counties of Johnson and Wyandotte. It is realized that enabling legislation must be enacted to incorporate a district crossing the state lines. However, it would be desirable to organize a district, taking care of the metropolitan area on the Missouri side to eliminate and prevent creation of unsatisfactory conditions which will affect public health. We therefore request that you render opinions on the following questions in order that the Division of Health may make recommendations for the creation of such a district to the interested local parties.

"1. Is it possible to form a sanitary drainage district for the purpose of transporting domestic sewage only and incorporating the City of Kansas City and portions of Jackson, Clay and Platte Counties under the provisions of Chapter 248, Revised Statutes of Missouri?

Dr. James R. Amos

"2. If it is possible to create a sanitary drainage district under the provisions of Chapter 248, Revised Statutes of Missouri, and incorporating the area as described, could this sanitary drainage district finance the construction of sanitary sewers through the issuance of revenue or general obligation bonds? "

We believe Sections 248.010 and 248.020, RSMo 1949, should first be noted. They read as follow:

"Section 248.010. Whenever the construction and maintenance of a common outlet or channel or of a system of drains or sewers for the drainage of any area in the state of Missouri shall become necessary to secure proper sanitary conditions for the preservation of the public health, if such area shall lie in part within and in part without the corporate limits of any city having a population of three hundred thousand or more, said area may be established and incorporated as a sanitary district under this chapter in the manner following, to wit: * * *

"Section 248.020. 2. Said commissioners may alter or amend the boundaries of the proposed district, as set forth in the petition or petitions, so that it may embrace all of the area capable of being efficiently drained by the common outlet or channel, or by the system of sewers or drains, or so as to exclude from the sanitary district any part of the natural drainage area which is so situated as not to be benefited by the proposed sanitary drainage, and for this purpose they shall have power to have made all surveys and maps necessary to locate and describe the said boundaries."

Dr. James R. Amos

These sections provide for the establishment of a sanitary district encompassing a natural drainage area. The area in question, that is, Kansas City and parts of Jackson, Clay and Platte Counties, meets this statutory requirement.

From your question, it is clear that you want this district to transport domestic sewage only. Domestic sewage is "sewage derived principally from dwellings, business buildings, institutions, and the like" (It may or may not contain ground water, surface water, or storm water.) The issue becomes, thus, whether Section 248.010, RSMo 1949, authorizes creation of a sanitary district for the purpose of carrying domestic sewage rather than ground and surface water, that is, water which, if carried by artificial means at all, is transported by drains, not sewers.

We believe that the language of Section 248.010, RSMo 1949, authorizes sanitary districts to build sewers or drains or to construct both. Moreover, it is our view that the legislature, when it provided for the creation of sanitary districts "necessary to secure proper sanitary conditions for the preservation of the public health," intended primarily to encourage the elimination of health hazards by proper sewage control, and that under Chapter 248, RSMo 1949, sanitary drainage districts may be created by the city of Kansas City and part of Clay, Platte and Jackson counties for the transportation of domestic sewage only.

Section 248.130 does undertake to provide the authorization by an order of the circuit court having jurisdiction for the issuance of sanitary district bonds if, in the judgment of the board of trustees, the means provided in Section 248.120 are insufficient to provide for the construction of the whole or any part of a general plan adopted as an urgent sanitary measure in the anticipation of revenue of the sanitary district for the ten years next ensuing computed on the basis of an annual levy of one-half of one per cent upon the valuation for the year in which the authority for issue is given. Section 248.130, under both Sections 26(b) of Article VI of the present constitution and Section 12 of Article X of the Constitution of 1875, which, respectively, provide now and then did provide for the creation of an indebtedness in excess of the anticipated revenue of the district only as was provided in the former constitution and is now provided in Section 26(b) of the present constitution, should be held to be unconstitutional as authorizing the creation of indebtedness in a way not authorized by the constitution of Missouri of 1875 or the present constitution of the state, and

Dr. James R. Amos

upon such grounds said Section 248.130 is here held to be in conflict with such terms of the former and the present constitutions of Missouri and is, therefore, void.

We believe it is clear that under the terms of Section 26(b), Article VI, of the 1945 constitution, an election may be held by any political corporation or subdivision of the state for the creation of a debt authorized by the constitution and issue bonds in discharge thereof. Under the provisions of Section 248.050, RSMo 1949, a sanitary district is created in law and in equity as a body corporate and politic to be known in the name and style of "the sanitary district of _____."

Section 26(b) of Article VI, of the Constitution of Missouri, 1945, reads as follows:

"Any county, city, incorporated town or village, school district or other political corporation or subdivision of the state, by vote of two-thirds of the qualified electors thereof voting thereon, may become indebted in an amount not to exceed five per centum of the value of taxable tangible property therein as shown by the last completed assessment for state and county purposes."

It is apparent, also, that Section 248.050 brings a sanitary district as a body corporate and politic expressly within the terms of said Section 26(b) of Article VI of the Constitution, with respect to the issuance of sanitary district bonds.

Said Section 26(b), supra, is now what formerly constituted Section 12 of Article X of the Missouri Constitution of 1875. That section of the former constitution was held by the Supreme Court of Missouri to be self enforcing, and required no legislation to give it full and complete operating effect to authorize an election for the creation of indebtedness and the payment thereof by bonds by counties for public purposes in excess of the yearly income of the county, with the assent of two-thirds of the voters thereof voting at an election held for that purpose. This was the express ruling and decision of the Supreme Court of Missouri in *State ex rel. Clark County v. Hackmann, State Auditor*, 218 S. W. 318. The court there, at l. c. 324, holding that Section 12 of Article X of the Constitution of Missouri, 1875, was self enforcing, said:

Dr. James R. Amos

"* * * Whilst section 12 of article 10 is a clear limitation on the power to create debts, and the power to increase taxes, it is likewise a grant of power to do both in a certain way and within a prescribed limit. There is no question of the limit in this case, because the debt is within the limit. The certain way is fixed, and that is by a vote of the people. The grant or right to determine the question by a vote of the people is fixed by this constitutional provision. Even the limitations in this section of the Constitution are of two classes. First we have those that must fall within the limitation of 'five per centum on the value of the taxable property therein'; and, secondly, we have those where the limit is higher, as stated in the first proviso. This proviso refers to certain specific matters, i.e., courthouse, jail, and rock roads. These two classes should not be overlooked. The first embraces all usual county purposes; the other is specific county purposes. The payment of legal debts falls within the first, and whilst both require the vote of the people, the latter, being a call for much heavier taxation, has been looked after by special legislation as to the elections for such purposes. But this does not mean that as to the first class named the Constitution itself is not sufficient authority for the election. In State ex rel. v. M.K. & T. Ry. Co., 164 Mo. loc. cit. 213, 64 S.W. 188, it is said:

" 'The power being conferred to hold an election, and no means provided therefor, carries with it, as an inevitable and indubitable incident, the usual and customary means to put into effect the power thus conferred.'

"Whilst section 12, art. 10, inhibits

Dr. James R. Amos

counties from contracting debts 'exceeding in any year the income and revenue provided for such year,' yet in addition to this inhibition is a grant of authority to contract in excess of the yearly income and revenue, with 'the assent of two-thirds of the voters thereof voting at an election to be held for that purpose.' If this is not a grant of the authority, there is no such authority. Without this grant the Legislature would be powerless, and no law passed by the Legislature could give it. This because of the broad and positive restriction in the first paragraph, so that, for the ordinary and usual county public purposes, the real grant to hold an election comes from the Constitution. And where no machinery has been provided for such an election, it is sufficient if there is used the ordinary and usual machinery provided for obtaining the expression of the votes upon the question. In this case the Legislature in 1919 has specifically provided the method, which is not materially different from the one used here, but if our views of the situation are correct, there would be a useless expenditure of money to require a new vote under the act of 1919. We think there was authority for the election without this act, and that the act was passed to make assurance doubly sure."

The supreme court has upheld and approved its decision in the Hackmann case, supra, on the same question, in State ex rel. Gilpin et al. v. Smith, State Auditor, 96 S. W. (2d) 40, and in State ex rel. City of Fulton v. Smith, State Auditor, 194 S. W. (2d) 302.

In the Gilpin case the court, at l.c. 41, reaffirmed its holding in the Hackmann case, and said:

"In the case of State ex rel. Clark

Dr. James R. Amos

County v. Hackmann, 280 Mo. 686, 218 S. W. 318, the county court of Clark county submitted to the voters the proposition of incurring an indebtedness in the sum of \$103,944.04, and issuing bonds of the county therefor, to pay judgments against the county. The bonds were duly authorized at a special bond election by a vote of more than two-thirds of the electors voting on the proposition. We sustained the validity of the bonds on the grounds that section 12 of article 10 of our State Constitution in itself constitutes a grant of authority to contract indebtedness for a public purpose with the assent of two-thirds of the voters voting on the proposition, and within the debt limitation specified in section 12 of article 10 of the Constitution. We also held that the debt created by the bond issue was for a 'public purpose' within the meaning of section 3 of article 10 of our Constitution."

The court, in the City of Fulton case against Smith approved the Hackmann case and, at l.c. 304, 305, ruled:

"State ex rel. Clark County v. Hackmann, 280 Mo. 686, 218 S. W. 318, is directly in point. There a constitutional provision was held to be self-executing which granted power to counties to create debts for county public purposes by elections (by a prescribed majority) held for the purpose, but no machinery was provided for such election. A special election was called upon a petition signed by more than 300 voters and taxpayers at which the proposition to issue the bonds was submitted, and approved by the requisite majority. After that election, and before the case was determined on appeal, the legislature passed an act specifically providing a

Dr. James R. Amos

method of holding such elections. And this court held it sufficient if there is used the ordinary and usual machinery provided for obtaining the expression of the voters upon the question. The following from State ex rel. Miller v. Missouri K. & T. Ry. Co., 164 Mo. 208, loc. cit. 213, 64 S. W. 187 loc. cit. 188, was cited approvingly: 'The power being conferred to hold an election, and no means provided therefor, carries with it as an inevitable and indubitable incident the usual and customary means to put into effect the power thus conferred.' The court further held that despite the later enacted specific act, there was authority for the election. The Clark County case was followed in the later case of State ex rel. Gilpin v. Smith, 339 Mo. 194, 96 S. W. 2d. 40." (See, also, State ex rel. Miller v. M.K.& T. Ry.Co., 164 Mo. 208, l.c. 212,213.)

The supreme court, in the Gilpin case, supra, and in the city of Fulton case, supra, held that the terms of Section 12 of Article X of the 1875 constitution were self enforcing. The same rule that it is self enforcing applies with equal force to Section 26(b) of Article VI of the present constitution of this state.

It is, considering the premises, the further opinion of this office that Section 26(b) is self enforcing, and that under its terms an election may be held by a sanitary drainage district without additional legislative authority to authorize the creation of an indebtedness by such district, and that bonds may be issued by such district therefor in an amount not to exceed five per cent of the value of the taxable tangible property therein as shown by the last completed assessment for state and county purposes.

CONCLUSION

It is, therefore, the opinion of this office that Chapter

Dr. James R. Amos

248, RSMo 1949, authorizes the creation by the city of Kansas City, and parts of Clay, Platte and Jackson counties, of a sanitary drainage district to carry domestic sewage only, and that such district is a political subdivision which may become indebted in an amount allowed by Section 26(b), Missouri Constitution, 1945.

The foregoing opinion, which I hereby approve, was prepared by my assistant, George W. Crowley.

Very truly yours

John M. Dalton
Attorney General

GWC:lc

COUNTY COURTS:
COUNTIES:
ASSESSORS:
DEPUTY ASSESSORS:
TAX SHEETS:
ISSUANCE OF WARRANTS
BASED UPON TAX SHEETS:



(1) The county may recover the portion of the overpayment that has been made by it through the county court to the assessor. (2) The county court is entitled to count the sheets and inspect them before issuing the warrant for payment to the assessor upon said sheets. (3) There is no law making it mandatory upon the county court to advance money to the assessor sufficient to pay his deputies prior to the delivery of the tax books, and further, the county court is without authority to make such advancements prior to the delivery of the tax books.

March 23, 1956

Honorable Sam Appleby
Prosecuting Attorney
305 Courthouse
Christian County
Ozark, Missouri

Dear Mr. Appleby:

This department is in receipt of your recent request for our official opinion which reads as follows:

"The Christian County Court has requested me to advise them as to whether or not they are entitled to a refund from the county assessor to the full extent of 66¢ per tax sheet delivered to them that appears, after checking and placing on tax books to be one of the following:

"1. A double assessment, that is where one sheet is signed by the assessor and one duplicate signed by the individual assessed, which have heretofore been counted by the assessor as two sheets.

"2. Assessments of personal property of individuals no longer residing in Christian County and who were not living in Christian County on January 1st of the tax year, these all being signed by the tax assessor based upon his knowledge and belief, but which appear to the county court as they stated to me a mere copy of the tax sheet for the preceding year.

"The other question ask of me is whether or not the county court or their deputies are entitled to count the sheets before issuing the warrant when the books are turned over to the county clerk by the assessor. On this point, the court

Honorable Sam Appleby

informs me that the assessor has specifically told them in the past that they could not lay a hand upon his works until the delivery was completed, which entailed the delivery of the warrant simultaneously to the assessor as he in turn handed them as they termed it, 'a pig in the poke'. The third question, the court propounded is, is there any law making mandatory their advancing to an assessor of a fourth class county sums, if any, sufficient to pay his deputies, all being prior to the delivery of the tax books.

"I find nothing specifically in our laws that prohibits the county clerk during the exchanging transactions to require the county clerk to accept the 'pig in the poke', as maintained by the assessor. I further find no authority for the county court to advance any sums for defraying his expenses until the assessment is completed.

"If your office has any opinions that would enlighten me on these problems, I hereby request a copy of each. If your office has expressed an opinion on these problems, I respectfully request an opinion on above problems, if not, I respectfully request your judgment and opinion."

Assuming that the money can be recovered, it should be made clear that the county court is not the proper party to institute a suit for the recovery thereof. The county court, as an agent of the county, may request the assessor to return the overpayment, but it is not otherwise the real party in interest.

It is the opinion of this office that the county can recover only the portion of the overpayment which it, through the county court, has paid out.

The authority to maintain the action can be found in Nodaway County v. Kidder, 344 Mo. 795, 129 S.W. 2d, 857. There the county court allowed claims for expenses by the presiding judge of said court, and warrants were issued and paid. The county then brought the action alleging that the claims for which the payments had been made were illegal, irrespective of the fact that the county court had allowed such. In allowing the county to recover back the amount that had been overpaid, the court said:

Honorable Sam Appleby

"Plaintiff sued appellant for money had and received by appellant to plaintiff's use. This action is a favorite of the law. * * * The action lies whenever one person has received money belonging to another which in equity and good conscience he ought to pay to the owner. * * * When a public official wrongfully receives public funds, although paid to him under an honest mistake of law, he must restore such funds. * * *

"The rule is stated in 15 C.J. 509, Sec. 176, as follows: 'Money paid to a county officer to which he is not entitled by law may be recovered back, without previous demand, in an action for money had and received instituted by the county.'

"The rule is also stated as follows: 'As a general rule any compensation paid to a public official by the state or other governmental body not authorized by law, or in excess of the compensation authorized by law, may be recovered by the proper governmental body * * *.' 46 C. J. 1030, Sec. 285."

See also County of Jackson v. Fayman 329 Mo. 423, 44 S.W. 2d, 849, a related case, where the court discussed the issues of fraud, lack of consideration, and res judicata, along with the powers and duties of the county court.

Your second question is whether or not the county court or their deputies are entitled to count the sheets before issuing the warrant when the books are turned over to the county clerk by the assessor. It is the opinion of this office that the county court may count such sheets, and further, that it may make any audit or inspection necessary to determine the correctness of said sheets before issuing the warrant. See the case of State v. Gomer 340 Mo. 107, 101 S.W. 2d 57, involving the assessor's sureties liability. The court said at l.c. 68:

"* * * When an assessor completes his work he does not decide the question of amount of compensation for himself, but must present a bill for his services, and it is the duty of the county court to investigate and audit his account before entering an order approving it for payment. * * *

Notice that the court says that the county court has the duty to investigate and audit the account before entering an order approving it for payment.

Lastly, you ask whether or not there is any law making it mandatory upon the county court to advance money to the assessor for the purpose of paying his deputies, prior to the delivery of the tax books.

Honorable Sam Appleby

The answer to this question is that the county court may not make such advancements. It is without authority to make advancements to the assessors before the delivery of the tax books. See State v. Gomer and the language quoted therefrom cited on page 3 of this opinion.

See also the enclosed opinion written by this office to the Honorable George Q. Dawes, Prosecuting Attorney, Iron County, dated April 7, 1955.

CONCLUSION

It is therefore the opinion of this office that:

(1) The county may recover the portion of the overpayment that has been made by it through the county court to the assessor.

(2) The county court is entitled to count the sheets and inspect them before issuing the warrant for payment to the assessor upon said sheets.

(3) There is no law making it mandatory upon the county court to advance money to the assessor sufficient to pay his deputies prior to the delivery of the tax books, and further, the county court is without authority to make such advancements prior to the delivery of the tax books.

Yours very truly,

JOHN M. DALTON
Attorney General

HLH/bi

Enclosure

SPECIAL CHARTERED CITIES:
SEWERAGE PROJECTS:
AUTHORITY OF DIVISION OF
HEALTH:



The Division of Health of Missouri is without authority to require the submission of plans and specifications of sewers and sewage treatment facilities by the city of Kansas City, Missouri, since, under Section 19, Article VI, 1945 Constitution of Missouri, charter provisions of a special chartered city concerning purely municipal functions supersede the general laws relating thereto.

June 14, 1956.

Honorable James R. Amos, M.D.
Director, Division of Health
Jefferson City, Missouri

Dear Dr. Amos:

This will acknowledge receipt of your opinion request of December 20, 1955, which reads as follows:

"Enclosed herewith is correspondence between the Division of Health and officials of Kansas City, Missouri regarding submission of plans and specifications of sewers and sewage treatment facilities. In accordance with Section 192.200 we have requested the City to submit plans and specifications for sewerage works.

"I should appreciate your opinion as to whether or not the Division of Health is responsible for review and written approval of plans and specifications for sewerage works in Kansas City, Missouri."

Although the opinion request is directed toward the provisions of Section 192.200, RSMo 1949, in view of the correspondence between interested parties in connection with the subject matter of the opinion, some incidental questions relating to rules and regulations of the Division of Health, (hereinafter referred to as the "Division") will be briefly discussed.

We think that the rules and regulations promulgated by the Division are valid. Yet, there are certain limitations on their operative effect which shall be pointed out later in the opinion. A well written opinion addressed to the Honorable Wm. Lee Dodd, March 10, 1949, (enclosed herewith) represents

Honorable James R. Amos, M.D.

an exhaustive study on the question of the validity of said rules and regulations, and the holding thereof that said rules and regulations are valid is hereby adopted.

In view of Section 192.310, RSMo 1949, a question is presented as to whether or not the city of Kansas City, Missouri, is subject to the rules and regulations promulgated by the Division. Said section reads as follows:

"Nothing in sections 192.260 to 192.320 shall apply to cities which now have, or may hereafter have, a population of seventy-five thousand or over which are maintaining organized health departments; provided, that such cities shall furnish the division of health reports of contagious, infectious, communicable or dangerous diseases, which have been designated by them as such, and such other statistical information as the board may require."

The particular section of those excluded in Section 192.310, supra, which is of interest, is Section 192.290, RSMo 1949. Said sections reads as follows:

"All rules and regulations authorized and made by the division of health in accordance with this chapter shall supersede as to those matters to which this chapter relates, all local ordinances, rules and regulations and shall be observed throughout the state and enforced by all local and state health authorities. Nothing herein shall limit the right of local authorities to make such further ordinances, rules and regulations not inconsistent with the rules and regulations prescribed by the division of health which may be necessary for the particular locality under the jurisdiction of such local authorities."

Suffice it to say that the authority of the Division, in requiring plans and specifications of sewer and sewage treatment facilities to be submitted, is not dependent upon Section 192.290, supra. Rather, without regard to the size of the city, the Division is given authority to require the submission of such plans and specifications under Section 192.200, RSMo 1949, which

Honorable James R. Amos, M.D.

reads as follows:

"Every municipal corporation, private corporation, company or individual supplying or authorized to supply water to the public within the state shall file with the division of health a certified copy of the plans and surveys of the water works with a description of the methods of purification and of the source from which the supply of water is derived, and no source of supply shall be used without a written permit of approval from the division of health, and no new supplies shall be established or dispensed to the public without first obtaining such written permit of approval. Whenever an investigation of any water supply, plant, or methods used shall be undertaken by the division of health, it shall be the duty of the municipality, corporation, company, institution or person having in charge the water supply under investigation to furnish on demand to the division of health such information as that body considers necessary to determine the sanitary quality of the water being dispensed. Approval of new water supplies for municipalities must necessarily involve consideration of sewage provisions for safety to the public health."

The last and real question to be decided is whether or not the Division has the authority under Section 192.200, supra, to require the city of Kansas City, Missouri, to submit the plans and specifications of sewers and sewage treatment facilities to the Division for the latter's approval or disapproval.

It appears that such authority does not exist in view of the fact that the City of Kansas City is a special chartered city under the Constitution of Missouri. As will be seen this conclusion would obtain irrespective of whether the supposed authority was predicated upon the provisions of Section 192.200, supra, or upon the rules and regulations promulgated by the Division entitled "Regulations Governing The Installation, Extension, and Operation of Sewerage Works."

Section 19, Article 6, 1945 Constitution of Missouri, reads in part as follows:

Honorable James R. Amos, M.D.

"Any city having more than 10,000 inhabitants may frame and adopt a charter for its own government, consistent with and subject to the constitution and laws of the state, * * *"

In a number of cases, this section has been construed that where the provisions of the special charter of a city chartered under this section and the general statutes are in conflict as to a municipal function, the special charter controls or supersedes the general law. City of Kansas City vs. Marsh Oil Company, 41 S.W. 943, 140 Mo. 458; U.S. v. Certain Lands in Jackson County, Missouri, D. C. 69 F. Supp., 56; Kansas City, Missouri, vs. J. I. Thrashing Machine Company et al., 87 S.W. 2d 195.

In the Thrashing Machine Case, supra, the Supreme Court of Missouri stated, l.c. 202:

"It, therefore, seems that the principle upon which the decisions may be harmonized is that as to its form of organization and as to its private, local corporate functions, and the manner of exercising them, the constitutional provision grants to the people of the cities designated part of the legislative power of the state for the purpose of determining such matters and incorporating them in their charter as they see fit, free from the control of the General Assembly. When matters of this nature are adopted in a charter, as prescribed by a Constitution, such charter provisions have the force and effect of a statute of the Legislature and can only be declared invalid for the same reason, namely, if they violate constitutional limitations or prohibitions. * * *"

Sewer projects are held to be matters of municipal concern, and therefore, with respect to a special chartered city, the regulations of such city supersedes the general laws relating thereto.

In the case of In re East Bottoms Drainage & Levee District Meriwether et al. v. Kansas City, 259 S.W. 89, the Supreme Court of Missouri said, l.c. 91:

"The creation of sewers and drains within cities and levees also, which accomplish the same purpose, is one of the elementary

Honorable James R. Amos, M.D.

functions of a local or municipal government.

"The construction * * * of a system of sewers for the municipality is clearly a municipal function.' 3 Dillon, Mun. Corp. (5th Ed.) § 1148.

"Logically all these are strictly municipal functions which especially and peculiarly promote the comfort, safety and happiness of citizens of the municipality rather than the welfare of the general public.' 28 Cyc. 269.

"(3) So essential are sewers to the hygiene and sanitation of municipalities that the rule of strict construction is relaxed in construing their powers to construct sewers. 9 R.G.L. p. 621; *McMurry v. Kansas City*, 283 Mo. Loc. Cit. 493, 223 S.W. 615.

"(4) Indeed, it may be said to be a matter of common knowledge that all cities of any considerable population in this state have from the earliest time, either by special charter or general law, been authorized to construct sewers and levees belonging to the same class of necessary local municipal improvements. Sewers are of a more local character and concern than streets in a city. *Donohoe v. Kansas City*, 136 Mo. loc. cit. 667, 38 S.W. 571. And it is well settled that streets are of such local concern that the freeholders' charter of Kansas City may contain its own special provisions for opening and grading streets, although they conflict with the general law relating to cities on that subject. *Kansas City v. Field*, 99 Mo. 352, 12 S.W. 802; *Kansas City v. Marsh Oil Co.*, 140 Mo. 458, 41 S.W. 943. We have also made the same ruling, as to primacy of the charter over the general state law relating to the establishment and maintenance of parks in said city. *Kansas City ex rel. v. Scarritt*, 127 Mo. 642, 29 S.W. 845, 30 S.W. 111. We must therefore rule that the charter provisions of said city relating to the establishment of levees and drains within said city are a matter of essential local municipal concern, properly contained in the freeholders'

Honorable James R. Amos, M.D.

charter of Kansas City, and prevail over the general law on that subject, if there is any difference or conflict between them."

In view of the language of the Supreme Court of Missouri in the above case, we find that a sewer project is a matter of municipal function, and consequently, where there is a conflict between local laws of a special chartered city concerning municipal functions and the general law relating thereto, the former supersedes the latter.

CONCLUSION

It is therefore the opinion of this office that the Division of Health of Missouri is without authority to require the submission of plans and specifications of sewers and sewage treatment facilities by the city of Kansas City, Missouri, since, under Section 19, Article VI, 1945 Constitution of Missouri, charter provisions of a special chartered city concerning purely municipal functions supersede the general laws relating thereto.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Harold L. Henry.

Very truly yours,

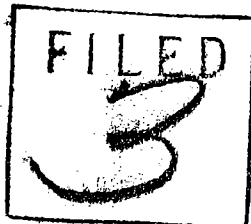
JOHN M. DALTON
Attorney General

HLH:bi:gm

Enc.

ELECTIONS:

Under the provisions of Section 111.405, RSMo Cum. Supp. 1955, the state may properly pay all necessary costs and expenses of election incurred in conducting the October 4, 1955, and January 24, 1956, elections if no other question is submitted to a vote at the "same election." The term "same election" as used in Sec. 111.405, supra, refers to an election which is required by law to be conducted by the same election officials.



February 24, 1956

Honorable Newton Atterbury
Comptroller and Budget Director
Capitol Building
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office, which request reads as follows:

"Section 111.405, page 168, Mo. Revised Statutes, Cumulative Supplement 1953, reads as follows:

"That hereafter when a question is submitted to a vote of all of the electors throughout the state, and no other question is submitted for a vote at the same election, all costs of such election shall be borne by the state, and after audit by the state comptroller, the state treasurer shall pay the amounts claimed by and due the respective political subdivisions out of any moneys appropriated by the legislature for that purpose."

"We assume that the election of October 4, 1955, is of the type covered by the law above quoted. We would like to ask your help on the following:

"(1) Is it proper for the State under the section of the law above quoted to pay the costs of elections such as the one held October 4, 1955, and the one called by the Governor to be held January 24, 1956?

Honorable Newton Atterbury

"(2) Under the provisions of Section 111.405 would any, or a portion of any county's expense, be paid if in that county other issues were voted on at the same time and place as was the vote for the special election. We have in mind instances where a representative, a senator or any other matter was presented to the voters of a county and voted on.

"(3) There had not been a special election in Missouri prior to the one on October 4, 1955, since the special election held in 1934. The section of the law which applies to the payment of expenses of a special election was not approved by the Governor until March 4, 1952. Basing our opinion on the various accounts which have come to this office, we believe the county clerks will need legal guidance in order to know just what expenses will be properly borne by the State. We would very much appreciate it if you would prepare an opinion for us stating the various items of expense that could be sent to the State for certification and payment, giving rates of pay and limits where they exist. The Auditor's office and the Comptroller's office could then prepare a form to be sent to each county, listing the various types of expenditures and in the form that we have previously used for certification to the State by the Clerk of the County Court. We believe the clerk of each county court should have a copy of the opinion we have requested."

You first inquire whether the provisions of Section 111.405, RSMo Cum. Supp. 1955, authorizes the state to pay the expenses incurred in conducting the special referendum held October 4, 1955, and the special election held January 24, 1956. We are enclosing herewith an opinion of this office to Honorable J. Marcus Kirtley, county counselor of Jackson County, under date of July 27, 1955, which holds that said section is applicable to the special election held October 4, 1955. Said statutory provision would, likewise, be applicable to the special election held January 24, 1956.

Honorable Newton Atterbury

You next inquire whether the state would be liable for the expenses of such an election if other issues were voted upon at the same time, such as a vote for the election of a state senator or representative. You will note that the state is required to bear the expenses of a state-wide election when no other question is submitted for a vote at the "same election." This office recently issued an opinion to Frank D. Connett, Jr., prosecuting attorney of Buchanan County, Missouri, holding that a municipal bond election held on the same day as the January 24, 1956 special election, did not constitute the "same election" as that term is used in Section 111.405, RSMo Cum. Supp. 1955. A copy of said opinion is enclosed herewith.

We understand the term "same election" to be one in which the same state election officials (judges and clerks) are required under applicable statutes, to conduct the vote on the special issues. For example, the election of a state representative or senator would be conducted by the same election officials and under the same general election laws as the special election held on October 4, 1955, or the special election held on January 24, 1956, and if the same was conducted on the same day we believe that it would be the "same election" as that term is used in the statute here under consideration.

Lastly, you inquire what election expenses could be properly paid by the state under said statute. It would be an extremely difficult task to undertake herein an extensive review of the voluminous statutory provisions relating to elections in the various classes of counties in an attempt to anticipate all of the questions which might arise in regard to what are proper election expenses. In view of such fact, we will here undertake only to direct your attention to certain of the more common expenses in a general way and reserve for later determination other questions presented as the occasion may arise. Limitations as to the following expenses, where limitations exist, are indicated, together with statutory citations.

(1) Judges and clerks of election shall be allowed for their services in conducting elections and returning the poll books and ballots to the county clerk's office, such compensation not to exceed \$6 per day as to the county court may seem reasonable. (Additional compensation may be allowed in precincts wherein more than 600 votes are cast.) Section 111.350, RSMo 1949.

(2) The sheriff or his deputy shall be allowed "reasonable compensation" for delivering the ballots to the judges of election of each election district. Section 111.480, RSMo 1949.

(3) The expenses of preparing polling places including rental. Section 111.530, RSMo 1949.

Honorable Newton Atterbury

(4) The cost of printing ballots. Section 111.440, 112.030, 112.330.

(5) The cost of election supplies (instructions to voters, tally sheets, etc.).

(6) Costs of publishing notice of election.

(7) Postage. (In re: Absentee ballots and returning poll books.)

(8) Expenses of messenger at the rate of ten cents per mile for returning poll books to the county clerk. Section 111.690.

CONCLUSION

Therefore, it is the opinion of this office that under the provisions of Section 111.405, RSMo Cum. Supp. 1955, the state may properly pay all necessary costs and expenses of election incurred in conducting the October 4, 1955, and the January 24, 1956, elections if no other question is submitted to a vote at the "same election."

We are further of the opinion that the term "same election" as used in Section 111.405, refers to an election which is required by law to be conducted by the same election officials.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Donal D. Guffey.

(2) Opinions enclosed to:
J. Marcus Kirtley, July 26, 1955.
Frank D. Connett, Jr. January 20, 1956.

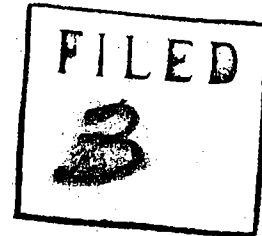
Yours very truly,

John M. Dalton
Attorney General

LAND CLEARANCE FOR
REDEVELOPMENT
AUTHORITY:

The land clearance for redevelopment authority is a political subdivision of the state, within the meaning of the Social Security Act and Section 105.300, RSMo Cum. Supp. 1955.

June 12, 1956



Honorable Newton Atterbury
Comptroller and Budget Director
Division of Comptroller and Budget
Department of Revenue
Jefferson City, Missouri

Dear Mr. Atterbury:

Your recent request for an official opinion reads as follows:

"The Federal Social Security Agency has presented a question to this office regarding the Land Clearance and Redevelopment Authority of St. Louis City and St. Louis County, Mo.

"Is the Land Clearance and Redevelopment Authority a political subdivision of the State within the meaning of the Social Security Act and Section 105.300 RS Mo Supplement 1955? This agency was organized under Section 99 RS Mo Supplement 1955."

We first note that paragraph (8) of Section 105.300, RSMo Cum. Supp. 1955, reads:

" 'Political subdivision', any county, township, municipal corporation, school district, or other governmental entity of equivalent rank; "

From this we see that a municipal corporation is a political subdivision of the state. Therefore, if a person is an employee of either a political subdivision or of a municipal corporation, he comes within the compass of Section 105.300, supra. We also see that, if the land clearance for redevelopment authority is either a political subdivision or a municipal corporation, its employees come within the compass of Section 105.300.

Honorable Newton Atterbury

In the 1939 case of *Larst Inv. Co. v. Dickmann*, 134 S.W. 2d 65, at l.c. 68 et seq., the Missouri Supreme Court stated in part:

"The Act does not expressly provide that the property of the Authority shall be exempt from taxation, but does expressly declare that the Authority is a municipal corporation incorporated for essential public purposes. Section 9743, Revised Statutes Missouri, 1929, Mo. St. Ann. § 9743, p. 7863, exempts from taxation 'lands and other property belonging to any city, county or other municipal corporation in this state.' However, the absence of any express exemption in the Act is of no consequence, because the constitutional provision above quoted is self enforcing and controlling. If the Housing Authority created under the Act is a valid municipal corporation performing an essential public function, then the property of the Authority is exempt from taxation without any statutory declaration to that effect, and its property would be exempt even if the Act had declared it taxable.

"What is a 'municipal corporation' within the meaning of the Missouri constitution? This court has never given an answer to that question which will apply to the facts of the instant case.

"The term 'municipal corporation' is sometimes used in a strict sense to designate a corporation possessing some specified power of local government. In a broader sense it includes public, or quasi public, corporations designed for the performance of an essential public service. See Dillon

Honorable Newton Atterbury

on Municipal Corporations, Fifth Ed. Sec.32.

"This court has adopted the broader definition. In State ex rel. Caldwell v. Little River Drainage District, 291 Mo. 72, loc. cit. 79, 236 S.W. 15, loc. cit. 16, we said: 'In its strict and primary sense the term "municipal corporation" applies only to incorporated cities, towns, and villages, having subordinate and local powers of legislation. Heller v. Stremmel, 52 Mo. 309. But in the larger and ordinarily accepted sense the term is applied to any public local corporation, exercising some function of government, and hence includes counties, school districts, townships under township organization, special road districts and drainage districts.'

"See also State ex rel. Kinder v. Little River Drainage District, 291 Mo. 267, 236 S.W. 848; Grand River Drainage District v. Reid, 341 Mo. 1246, 111 S.W. 2d 151; State ex rel. Caldwell v. Little River Drainage District, 291 Mo. 72, 236 S.W. 15; Harris v. William R. Compton Bond Co., 244 Mo. 664, 149 S.W. 603.

"The broad definition of a municipal corporation requires that it be formed for the purpose of performing some governmental function. The General Assembly, in the Act under consideration, declared the Housing Authority to be a municipal corporation, defined its purposes, declared them to be governmental functions, and declared the existence of an urgent necessity for its services.

"The finding and declaration of the General Assembly are not binding on this court, but

Honorable Newton Atterbury

are entitled to great weight. We do not know, and are not at liberty to ascertain, what evidence they had before them; we can only indulge the presumption that the evidence was sufficient to justify them in finding the existence of the conditions set forth in their declaration. We must presume that the declared purposes are 'public purposes' and 'governmental functions' unless it clearly appears that they are not in harmony with the provisions of the constitution. Ex parte Renfrow, 112 Mo. 591, loc. cit. 595, 20 S.W. 682; Halbruegger v. St. Louis, 302 Mo. 573, 262 S.W. 379; Jennings v. St. Louis, 332 Mo. 173, 58 S.W. 2d 979, 87 A.L.R. 365."

In the case of St. Louis Housing Authority v. St. Louis, 239 S.W. 2d 289, at l.c. 291, the Missouri Supreme Court said:

"This action by St. Louis Housing Authority, a chartered municipal corporation organized under our state 'Housing Authorities Law', R.S. Mo. 1949, §§ 99.010 to 99.230, originally approved May 15, 1939, Laws Mo. 1939, p. 488 (hereinafter called plaintiff) against the City of St. Louis, Missouri, a municipal corporation (hereinafter called defendant), is one under the Declaratory Judgment Act. Plaintiff seeks a judgment declaring that (1) plaintiff and defendant have constitutional and statutory authority to execute a certain contract called the 'Cooperation Agreement', and (2) that said 'Cooperation Agreement' is valid and legally commits plaintiff and defendant to the terms and conditions thereof. The validity and effect of that Cooperation Agreement is in issue here. A justiciable controversy is presented."

At l.c. 294 et seq., the court further stated:

Honorable Newton Atterbury

"A 'municipal corporation' is commonly called a 'municipality'. 62 C.J.S., Municipal Corporations, § 1, page 64; State ex rel Koontz v. Board of Park Commissioners, 131 W.Va. 417, 47 S.E.2d 689, 694. By both judicial recognition and common usage 'municipality' is a modern synonym of 'municipal corporation'. 'Municipality' is all embracing. It includes, of course, cities of all classes, as well as towns, but it includes also a non-profit agency, such as plaintiff, which is authorized to exercise public and essential governmental functions. By the General Assembly plaintiff's status is declared to be a municipal corporation exercising public and essential government functions. Webster's New International Dictionary, 2nd Ed., defines municipality as a municipal corporation. The suffix 'ity' denotes state, or condition of being. Thus municipality connotes the state or condition of being municipal in nature. The word 'municipal' is derived from the latin 'municipalis', and implies the right of local self government. Municipality now has a broader meaning than 'city' or 'town', and presently includes bodies public or essentially governmental in character and function and distinguishes public bodies, such as plaintiff, from corporations only quasi-public in nature. 42 C.J., p. 1413; 61 C.J.S., Municipal, page 945; Curry v. Sioux City Dist.Tp., 62 Iowa 102, 17 N.W. 191. But the two terms (municipality and municipal corporation) are often interchangeably used. Likewise, 'municipal corporation', in the broader sense now includes public corporations created to perform an essential public service and 'is applied to any public local corporation exercising some function of government'. 'Municipal corporation' now also includes a corporation created principally as an instrumentality of the state but not for the purpose of regulating the internal local and

Honorable Newton Atterbury

special affairs of a compact community. Columbia Irrigation Dist. v. Benton County, 149 Wash.234, 270 P. 813; 62 C.J.S., Municipal Corporations, § 5, page 76; State ex rel. Caldwell v. Little River Drainage District, 291 Mo. 72, loc. cit. 79, 236 S.W.15; Laret Inv. Co. v. Dickmann, supra; Dillon on Munic. Corp. 5th Ed. Sec. 32. Under the instant circumstances we are constrained to rule that both plaintiff and defendant are a 'municipality' as contemplated and used in Section 16 of Article VI of our Constitution and in R.S.Mo 1949, § 70.220. Both are likewise a 'municipal corporation'. Under the above considered sections plaintiff and defendant clearly possess the constitutional and statutory authority to execute the instant Cooperation Agreement."

An examination of the Municipal Housing Law, Chapter 99, RSMo 1949, which the two above cases held created municipal corporations, is so similar to the land clearance for redevelopment authority, Chapter 99, RSMo Cum. Supp. 1955, that it seems apparent that if the former creates a municipal corporation, as it is held to do in the cases above cited, the latter does also, and that since the definition of "political subdivision," numbered paragraph (8), Section 105.300 RSMo Cum. Supp. 1955, supra, includes "municipal corporation," supra, that the land clearance for redevelopment authority creates a political subdivision.

The Municipal Housing Law, Chapter 99, Section 99.080, RSMo 1949, reads in part as follows:

"An authority shall constitute a municipal corporation, exercising public and essential governmental functions, and having all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this chapter, including the following powers in addition to others herein granted:

"(1) To sue and be sued; to have a seal and to alter the same at pleasure; to have per-

Honorable Newton Atterbury

petual succession; to make and execute contracts and other instruments necessary or convenient to the exercise of the powers of the authority; and to make and from time to time amend and repeal bylaws, rules and regulations, not inconsistent with this chapter, to carry into effect the powers and purposes of the authority;

"(2) Within its area of operation: To prepare, carry out, acquire, lease and operate housing projects; to provide for the construction, reconstruction, improvement, alteration or repair of any housing project or any part thereof;

"(3) To arrange or contract for the furnishing by any person or agency, public or private, of services, privileges, works, or facilities for, or in connection with, a housing project or the occupants thereof; and (notwithstanding anything to the contrary contained in this chapter or in any other provision of law) to include in any contract let in connection with a project, stipulations requiring that the contractor and any subcontractors comply with requirements as to minimum wages and maximum hours of labor, and comply with any conditions which the federal government may have attached to its financial aid of the project;

"(4) To lease or rent any dwellings, houses, accommodations, lands, buildings, structures or facilities embraced in any housing project and (subject to the limitations contained in this chapter) to establish and revise the rents or charges therefor; to own, hold, and improve real or personal property; to purchase, lease, obtain options upon, acquire by gift, grant, bequest, devise, or otherwise any real or personal property or any interest therein; to acquire by the exercise of the power of

Honorable Newton Atterbury

eminent domain any real property in fee simple or other estate; to sell, lease, exchange, transfer, assign pledge, or dispose of any real or personal property or any interest therein; to insure or provide for the insurance of any real or personal property or operations of the authority against any risks or hazards; to procure or agree to the procurement of insurance or guarantees from the federal government of the payment of any bonds or parts thereof issued by an authority, including the power to pay premiums on any such insurance;

"(5) To invest any funds held in reserve or sinking funds, or any funds not required for immediate disbursement, in property or securities in which savings banks may legally invest funds subject to their control; to purchase its bonds at a price not more than the principal amount thereof and accrued interest, all bonds so purchased to be canceled; * * *

The land clearance for redevelopment law, Section 99.420, RSMo Cum. Supp. 1955, reads in part as follows:

"An authority shall constitute a public body corporate and politic, exercising public and essential governmental functions, and having all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this law, including the following powers in addition to others herein granted;

"(1) To sue and to be sued; to have a seal and to alter the same at pleasure; to have perpetual succession; to make and execute contracts and other instruments necessary or convenient to the exercise of the powers of the authority; and to make and from time to time amend and repeal by-laws, rules and regulations, not inconsistent

Honorable Newton Atterbury

with this law, to carry out the provisions of this law;

"(2) To prepare or cause to be prepared and recommend redevelopment plans and urban renewal plans to the governing body of the community or communities within its area of operation and to undertake and carry out land clearance projects and urban renewal projects within its area of operation;

"(3) To arrange or contract for the furnishing or repair, by any person or agency, public or private, of services, privileges, works, streets, roads, public utilities or other facilities for or in connection with a land clearance project or urban renewal project; and notwithstanding anything to the contrary contained in this law or any other provision of law, to agree to any conditions that it may deem reasonable and appropriate attached to federal financial assistance and imposed pursuant to federal law relating to the determination of prevailing salaries or wages or compliance with labor standards, in the undertaking or carrying out of a land clearance project or urban renewal project, and to include in any contract let in connection with such a project provisions to fulfill such of the conditions as it may deem reasonable and appropriate;

"(4) Within its area of operation, to purchase, lease, obtain options upon, acquire by gift, grant, bequest, devise, eminent domain or otherwise, any real or personal property or any interest therein, including fee simple absolute title, together with any improvements thereon, necessary or incidental to a land clearance project or urban renewal project; to hold, improve, clear or prepare for redevelopment or urban renewal any such

Honorable Newton Atterbury

property; to sell, lease, exchange, transfer, assign, subdivide, retain for its own use, mortgage, pledge, hypothecate or otherwise encumber or dispose of any real or personal property or any interest therein; to enter into contracts with redevelopers of property and with other public agencies containing covenants, restrictions and conditions regarding the use of such property for residential, commercial, industrial, recreational purposes or for public purposes in accordance with the redevelopment or urban renewal plan and such other covenants, restrictions and conditions as the authority may deem necessary to prevent a recurrence of blighted or insanitary areas or to effectuate the purposes of this law; to make any of the covenants, restrictions, or conditions of the foregoing contracts covenants running with the land, and to provide appropriate remedies for any breach of any such covenants, or conditions, including the right in the authority to terminate such contracts and any interest in the property created pursuant thereto; to borrow money and issue bonds and provide security for loans or bonds; to insure or provide for the insurance of any real or personal property or operations of the authority against any risks or hazards, including the power to pay premiums on any such insurance; and to enter into any contracts necessary to effectuate the purposes of this law; provided, however, that no statutory provision with respect to the acquisition, clearance or disposition of property by other public bodies shall restrict an authority or other public bodies exercising powers hereunder, in such functions, unless the legislature shall specifically so state; * * *

As we stated above, in view of the similarity of the law and the authority granted, it is obvious that if the municipal housing law creates a municipal corporation, as it has been held to do, then the land clearance for redevelopment law does the same thing.

Honorable Newton Atterbury

CONCLUSION

It is the opinion of this department that the land clearance for redevelopment authority is a political subdivision of the state, within the meaning of the Social Security Act and Section 105.300, RSMo Cum. Supp. 1955.

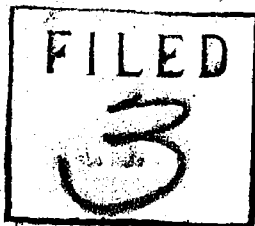
The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours

John M. Dalton
Attorney General

HPW:lc

COURT REPORTERS: Sec. 485.065 of H.B. 384, 68th General Assembly comprehends court reporters of St. Louis Court of Criminal Correction authorized by Sec. 485.140 of said law.



July 12, 1956

Honorable Newton Atterbury
Comptroller and Budget Director
State Department of Revenue
Capitol Building
Jefferson City, Missouri

Dear Sir:

The following opinion is rendered in reply to your request of recent date posing a question which we restate as follows:

"Does Section 485.065 of House Bill 384, passed by the 68th General Assembly comprehend court reporters of the St. Louis Court of Criminal Correction authorized by Section 485.140 of said law?"

Section 485.065 of House Bill 384, supra, provides:

"Three-fourths of the salary of the court reporter shall be paid out of the county treasury and one-fourth out of the state treasury. Where a judicial circuit is composed of more than one county, the county part of the salary shall be divided among the counties and be paid by them proportionately as the population of such county bears to the entire population of the circuit."

From language contained in your letter of inquiry it stands conceded that the appropriation made by the 68th General Assembly, Special Session, House Bill No. 5, Section 10, does make special reference to court reporters of Courts of Criminal Correction, and such reference can be to none other than the St. Louis Court of Criminal Correction and its divisions. House Bill 384, supra, is directed to Chapter 485,

Honorable Newton Atterbury

RSMo 1949, as amended, which is the basic law applicable to court reporters and stenographers attending courts of record mentioned therein.

We summarize our review of House Bill 384, supra. Section 485.040 of House Bill 384 amended, by repeal and reenactment, Section 485.040 RSMo 1949, so as to clothe courts of common pleas, and all divisions of such courts, with authority to appoint an official reporter. The particular statute before amendment only referred to circuit courts and their divisions. House Bill 384 amended, by repeal and reenactment, Section 485.140 RSMo 1953 Supp., which was the special statute in Chapter 485 RSMo 1949, vesting authority in judges of each division of the St. Louis Court of Criminal Correction to appoint a court reporter. The 1955 amendment to Section 485.140 contains the following provision:

" * * * Each of such reporters shall receive an annual salary of six thousand five hundred dollars, payable in equal monthly installments on the certificate of the judge of the court certifying as to the time served by the reporter."

Before the 1955 amendment of Section 485.140, supra, the foregoing quoted provision read as follows:

" * * * Each of such reporters shall receive an annual salary of five thousand dollars, payable in equal semi-monthly installments out of the treasury of the city of St. Louis on the certificate of the clerk of said court certifying as to the time served by said reporter." (Emphasis supplied.)

It is apparent from comparing the two above quoted provisions of the statute that the 1955 amendment raised the salary of the reporters of the St. Louis Court of Criminal Correction, made provision for paying them monthly rather than semi-monthly, and deleted the provision making specific reference to the treasury of the City of St. Louis. This was obviously done to cause this particular statute to become germane to Section 485.065 of House Bill 384 which provides how court reporters appointed under Chapter 485 RSMo 1949, as amended, are to be paid. No problem is presented due to the fact that Section 485.140 of House Bill 384 no longer

Honorable Newton Atterbury

contains a provision providing that the reporters for the St. Louis Court of Criminal Correction are to be paid out of the treasury of the City of St. Louis. In *McClellan v. City of St. Louis*, 170 S.W. (2d) 131, 1.c. 132, the St. Louis Court of Appeals spoke as follows:

"The City of St. Louis has a dual character and acts in a dual capacity. It exercises county functions and municipal functions. Like other municipalities in the state it may as a municipality exercise governmental functions. As a county it is a political subdivision of the state."

CONCLUSION

It is the opinion of this office that Section 485.065 of House Bill 384, passed by the 68th General Assembly comprehend court reporters of the St. Louis Court of Criminal Correction authorized by Section 485.140 of said law.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

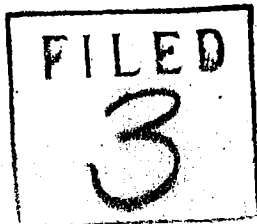
Very truly yours,

John M. Dalton
Attorney General

JL O'M:gm

SOCIAL SECURITY:
COUNTY AGRICULTURAL
EXTENSION COUNCIL:

The County Agricultural Extension Council is an
instrumentality of the State.



September 26, 1956

Honorable Newton Atterbury
State Comptroller and Director
of the Budget
State of Missouri
Jefferson City, Missouri

Dear Mr. Atterbury:

This will acknowledge receipt of your request inquiring whether the Agricultural Extension Council created under Chapter 262, RSMo Cum. Supp. 1955, is a political subdivision of the state; or should the employees of such council be covered as county employees under Chapter 105, RSMo Cum. Supp. 1955, which applies to old age survivors' insurance.

Under date of October 25, 1951, this department rendered an opinion, a copy of which we are enclosing, to Honorable John E. Downs, Prosecuting Attorney, Buchanan County, Missouri, wherein it was held that employees of the "County Farm Bureau" are not county employees under the provisions of Senate Bill No. 3, but said Bureau is an instrumentality.

While your request does not pertain to the "County Farm Bureau," but relates to the County Agricultural Extension Council, the creation, duties, administration, employment of personnel, payment of expenses, and salaries of said employees are almost identical to those pertaining to the Farm Bureau.

Section 262.561, RSMo Cum. Supp. 1955, provides for the organization of a County Agricultural Extension Council and Section 262.581 further provides that it shall be recognized as the official body within the county to cooperate with the University of Missouri in carrying out the provisions of the Smith-Lever Act of Congress, approved May 8, 1914, and acts supplementary thereto. See also Section 262.555, RSMo Cum. Supp. 1955.

Honorable Newton Atterbury

Under Section 262.565, RSMo Cum. Supp. 1955, it further authorizes the executive board of said Council to fix compensation of such persons as are necessary for the conduct of business of said Council, except as otherwise provided in Chapter 262, RSMo 1949, and RSMo Cum. Supp. 1955. Furthermore, under Section 262.591, RSMo Cum. Supp. 1955, said Council shall prepare an annual financial budget covering the county's share of the cost of performing certain functions placed upon said Council, which shall be filed with the county court and shall be included in its budget.

Under Section 262.601, RSMo Cum. Supp. 1955, it requires said Council, following the close of each month, to requisition the county court for an amount equal to the total amount of monthly expenditures and further requires the county court to issue its warrant for such amount in favor of said Council. And last, under Section 262.611, RSMo Cum. Supp. 1955, said Council is required to make an annual detailed report to the county court.

In view of the similarity of the creation of said Council, its duties, employment, etc., to that of the "County Farm Bureau" fully set forth in the above mentioned opinion, we are inclined to believe that the conclusion reached in said opinion is applicable in the instant case.

CONCLUSION

Therefore, it is the opinion of this department that the County Agricultural Extension Council is an instrumentality and not a political subdivision.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

John M. Dalton
Attorney General

Enclosure(1)

ARH:mw

CRIMINAL LAW:
MISDEMEANOR CASES:
MAGISTRATE COURTS:
PROSECUTING ATTORNEY
NOT REQUIRED TO FILE
INFORMATION:
WHEN:



When complaint of individual alleging commission of misdemeanor is filed in magistrate court in accordance with Sections 543.020 and 543.030 RSMo 1949, if after having fully investigated facts, prosecuting attorney believes same insufficient to sustain conviction of accused, he may, within his discretion, refuse to file information or to proceed further in matter.

March 23, 1956

Honorable Henry Balkenbush
Prosecuting Attorney
Osage County
Linn, Missouri

Dear Mr. Balkenbush:

This department is in receipt of your recent request for our legal opinion and reads as follows:

"This office is desirous of an official opinion on the following question:

"When the prosecuting attorney is approached by a person who intends and demands to file an affidavit for an information that a crime has been committed, and after the prosecuting attorney weighs the facts and circumstances involved and determines that the matter is trivial and at most only a technical violation of a criminal statute has been committed and refuses to prosecute, then, thereafter this person files an affidavit for an information with the Magistrate Court, is the prosecuting attorney required under his oath of office required to file an information and prosecute the person against whom the affidavit has been filed.

"This matter has come up twice within the last two years and will no doubt come up in the future and I wish something in point on this question. I have been of the opinion that the office of prosecuting attorney has discretionary judgment in such matters."

We construe your inquiry to be, that when a private citizen files a complaint with a magistrate court accusing a named person with the commission of a misdemeanor described in the complaint, is it the duty of the prosecuting attorney to file an information based on the complaint, or is it discretionary with the prosecuting attorney as to the filing of an information.

Honorable Henry Balkenbush

Section 543.020 RSMo 1949 provides that the prosecution of misdemeanors before magistrates shall be by information and reads as follows:

"Prosecutions before magistrates for misdemeanors shall be by information, which shall set forth the offense in plain and concise language, with the name of the person or persons charged therewith; provided, that if the name of any such person is unknown such fact may be stated in the information and he may be charged under any fictitious name; and when any person has actual knowledge that any offense has been committed that may be prosecuted by information, he may make complaint, verified by his oath or affirmation, before any officer authorized to administer oaths, setting forth the offense as provided by this section, and file same with the magistrate having jurisdiction of the offense, or deliver same to the prosecuting attorney; and whenever the prosecuting attorney has knowledge, information or belief that an offense has been committed, cognizable by a magistrate in his county, or shall be informed thereof by complaint made and delivered to him as aforesaid, he shall forthwith file an information with the magistrate having jurisdiction of the offense, founded upon or accompanied by such complaint."

Section 543.030 RSMo 1949 requires all informations referred to in the preceding section to be filed by the prosecuting attorney and reads as follows:

"All such informations shall be made by the prosecuting attorney of the county in which the offense may be prosecuted under his oath of office, and shall be filed with the magistrate as soon as practicable, and before the party or parties accused shall be put upon their trial, or required to answer the charge for which they may be held in custody; provided, that complaints subscribed and sworn to by any person competent to testify against the accused may be filed with any magistrate, and if the magistrate be satisfied that the accused is about to escape, or has no known place of permanent residence or property in the county likely to restrain him from leaving for the offense charged, he shall immediately issue his warrant and have the accused arrested and held until the prosecuting attorney shall have time to file an information."

Honorable Henry Balkenbush

Whenever a complaint of the kind referred to in the two sections of the statutes quoted above is filed with a magistrate, he shall notify the prosecuting attorney of the county and send a copy of the complaint to him together with the facts which can be proven against the accused, and the names and addresses of the witnesses who can testify to such facts. If after an investigation of said facts, the prosecuting attorney is satisfied that an offense has been committed as alleged, and that a case can be made against the accused, he shall immediately file an information based on said complaint with the magistrate.

Upon the filing of the information, the magistrate shall forthwith issue a warrant for the arrest of the defendant upon the criminal charge alleged in the information.

A magistrate is unauthorized, under the provisions of Sections 543.020 and 543.030 supra, to issue a warrant for the arrest of the accused person named in the complaint, until the prosecuting attorney has filed an information against such person, unless the magistrate is satisfied that the accused is about to escape, or has no known place of permanent residence or property within the county likely to restrain him from leaving because of the offense charged against him. In such instances the magistrate may issue a warrant for the arrest of the accused person even though the prosecuting attorney has not yet filed an information against such accused person.

The court commented upon the authority of a justice of the peace to issue a warrant for the arrest of one accused of a crime before an information had been filed, in the case of McCaskey v. Garrett, 91 Mo. App. 354. The statute involved was Section 2750 R. S. Mo. 1899, which is now Section 543.030, supra. At l.c. 359 the court said:

"Section 2750 of the Revised Statutes, supra, under which the affidavit was filed, did not authorize the issuance of the warrant for the plaintiff's arrest, unless the justice with whom the affidavit was filed was satisfied that the said accused was about to escape, or had no known place of permanent residence or property in the county likely to restrain him from leaving for the offense charged, and the same was therefore an illegal process. The justice issued it, he says, at the insistence of the defendant, who represented to him that the prosecuting attorney, Mr. Blair, wanted it issued."

There can be no prosecution of the accused, without the filing of an indictment of a grand jury or an information by the prosecuting attorney, since the filing of a formal accusation of a criminal offense, and not the filing of the complaint with a magistrate, is the commencement of a criminal prosecution. This principle was held to be the law in the case of City of Pilot Grove v. McCormick, 56 Mo. App. 530, at l.c. 533, 534 the court said:

Honorable Henry Balkenbush

"It seems to be conceded, all around, that both proceedings were in all respects regular and that both the police court and the justice had jurisdiction of the offense. Unless the filing of the complaint before the justice was the commencement of a prosecution against the defendant, that commenced by the city was first in point of time. The term 'prosecution' as used in section 2, article 12 of the constitution of this state, has been construed to mean a prosecution instituted by some officer whose duty it is to prosecute criminal offenses, State v. Kelm, 79 Mo. 515; State v. Shortell, 93 Mo. 123; Kansas City v. O'Conner, 36 Mo. App. 594. It is further declared in the above cited cases that an affidavit of a private individual made under the statutory provisions already referred to, was not an information and would not support a prosecution. And in State v. Powell (44 Mo. App. 21), the St. Louis Court of Appeals held that the filing of an information was the commencement of the prosecution, and until that was done there was no prosecution. Applying these rules to the facts of this case, it will be seen that the prosecution of the defendant was not commenced by the state until the filing of the information by the prosecuting attorney which did not take place until two days after the commencement of the prosecution by the city."

The court discussed the duties of the prosecuting attorney generally in criminal cases, and particularly as to the discretion allowed him by law in instituting, or in failing to institute criminal prosecutions, in the case of State v. Smith, 258 S.W. 2d 590, which appears to be the leading Missouri case on the subject. Inasmuch as it is in point with the matter of inquiry we quote a portion of said opinion shown at l.c. 593 as follows:

"When the law, in terms or impliedly, commits and entrusts to a public officer the affirmative duty of looking into facts, reaching conclusions therefrom and acting thereon, not in a way specifically directed, (i.e. not merely ministerially) but acting as the result of the exercise of an official and personal discretion vested by law in such officer and uncontrolled by the judgment or conscience of any other person, such function is clearly quasi judicial. The court has written much upon the broad discretion vested in a public prosecutor.

State on Inf. of McKittrick v. Wymore, supra;
State on Inf. of McKittrick v. Wallach, 353
Mo. 312, 182 S.W. 2d 313, 318, 319. In this
jurisdiction it is recognized that this public
office is one of consequence and responsibility.
The status of the prosecuting attorney as a public
officer is given dignity and importance by our
statutes. Sections 56.010 to 56.620 RSMo 1949,
V.A.M.S. With every other attorney at law a
prosecuting attorney is, of course, an officer of
the court in a larger sense; but he is not a mere
lackey of the court nor are his conclusions in the
discharge of his official duties and responsibilities,
in anywise subservient to the views of the judge as
to the handling of the State's cases. A public
prosecutor is a responsible officer chosen for his
office by the suffrage of the people. He is account-
able to the law, and to the people. He is 'vested
with personal discretion intrusted to him as a
minister of justice, and not as a mere legal attorney.
He is disqualified from becoming in any way entangled
with private interests or grievances in any way con-
nected with charges of crime. He is expected to be
impartial in abstaining from prosecuting as well as
in prosecuting, and to guard the real interests of
public justice in favor of all concerned.' Engle
v. Chipman, 51 Mich. 524, 16 N.W. 886, 887. 'The
sovereign power of government can only be exercised
through its officers. Consequently, to each officer
is delegated some of the powers and functions of
government. Usually a discretion that is within
the power granted to an officer cannot be controlled
by other officers.' State ex rel. Thrash v. Lamb,
237 Mo. 437, 141 S.W. 665, 669.

"It is clearly the weight of authority that if there
is no statute respecting the right to enter a nolle
prosequi (and there is no such statute in Missouri)
that such right lies within the sole discretion of
the prosecuting attorney. 14 Am. Jur. Criminal Law,
Sec. 296, p. 967, 22 C.J.S. Criminal Law, Sec. 457,
page 707. This court stated that principle in State
on Inf. of McKittrick v. Graves, 346 Mo. 990, 144
S.W. 2d 91, 95, wherein we said: 'Hence they (the
dismissals made by a prosecuting attorney of certain
criminal cases) lay within his discretion under the
power of nolle prosequi which the law vests in the
prosecuting officer in the absence of a statute on
the subject. 14 American Jurisprudence 967.' See
also Ex parte Claunch, 71 Mo. 233."

Honorable Henry Balkenbush

In view of the foregoing, it is our thought that it is the duty of the prosecuting attorney under the provisions of the applicable statutes and appellate court decisions of Missouri to institute and prosecute all alleged violations of the criminal laws in his county. However, when he has been notified, furnished with a written complaint of an individual filed in magistrate court accusing one of having committed a misdemeanor, together with the facts, the names and addresses of the witnesses by which such facts can be proven, as provided by said Sections 543.020 and 543.030, it is the duty of the prosecuting attorney to fully investigate the facts alleged in the complaint. If after such investigation the prosecuting attorney is satisfied that a crime has been committed and a case against the accused can be made, he shall immediately file an information charging the accused with the offense alleged in the complaint.

In the event the prosecuting attorney finds that no crime has been committed or that for other reasons no case can be made against the accused, then he may, within his discretion, refuse to file an information or to proceed further in the matter.

In the event he has previously filed an information before discovering the insufficiency of the evidence he may, within his discretion, dismiss said information and refuse to proceed further upon discovery of such facts, as the court held in that part of the opinion of State v. Smith quoted above.

It is our further thought that if no information has been filed but a complaint has been filed in magistrate court by him, he would be authorized to dismiss such complaint in the event he were satisfied no case could be made against the accused. Such was held to be the authority of the prosecuting attorney in an opinion of this department rendered to the Honorable W. C. Whitlow, Prosecuting Attorney of Callaway County on April 19, 1954. A copy of that opinion is enclosed for your consideration.

CONCLUSION

It is therefore the opinion of this department that when the complaint of an individual accusing another of the commission of a criminal offense, which is a misdemeanor, is filed in a magistrate court in accordance with the provisions of Sections 543.020 and 543.030 RSMo 1949, and if after having fully investigated the facts involved in the complaint the prosecuting attorney believes such facts insufficient to sustain a conviction of the accused, he may, within his discretion, refuse to file an information or to proceed further in said matter.

The foregoing opinion which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Yours very truly,

JOHN M. DALTON
Attorney General

PNC/ma/b1

COUNTY COURT:
BOUNTIES:
PREDATORS:

Section 279.010 RSMo Cum. Supp. 1955 does not authorize or direct the county court to pay a bounty for wolves, coyotes and wildcats other than animals of the full blood.



September 26, 1956

Honorable W. Frazier Baker
Assistant Prosecuting Attorney
Callaway County
Fulton, Missouri

Dear Mr. Baker:

Reference is made to your request for an official opinion of this office, which request reads as follows:

"At the request of the County Court of Callaway County, we would like to be advised as to whether or not an animal containing 50 per cent or some lesser percentage of wolf blood be classified as a wolf within the meaning of Section 279.010 Revised Statutes of Missouri, 1949 as amended and whether or not wolf bounties shall be paid on any animal having less than 100 per cent wolf ancestry."

Section 279.010 RSMo Cum. Supp. 1955 provides as follows:

"The county court of any county in this state shall pay a bounty of fifteen dollars each for any grown coyote or wolf and two and one half dollars each for any coyote or wolf pup which may be killed in such county, also a bounty of five dollars for each grown wildcat, and three dollars for each wildcat kitten which may be killed in such county; provided, that each such bounty shall not be paid for any coyote, wolf, wildcat, the pups of coyotes or wolves or kittens of wildcats which may have been raised in captivity either within or without this state; provided further, that a coyote or wolf pup and a wildcat kitten shall be deemed such when under ten weeks old; provided, also, that it shall be unlawful to import into this state any such animals

Honorable W. Frazier Baker

except for exhibition purposes and then only under permit as otherwise provided for by the statutes of this state."

Said section directs the county court to pay a bounty for coyotes, wolves and wildcats killed within the county. Said section or related sections do not undertake to define the animals specified, nor does said section specifically provide for the payment of a bounty on animals of less than full blood.

It is a familiar rule of statutory construction that unless words have a technical meaning or have acquired a peculiar meaning in law, they shall be taken in their plain or ordinary and usual sense. This rule is embodied in Section 1.090 of the Revised Statutes of Missouri. We know of no peculiar or technical definition of the term "wolf" and, therefore, are of the opinion that such term, as used in Section 279.010, was intended to mean animals of the full blood.

Of course, what would constitute an animal of the full blood would be a factual question to be determined by the county court in each particular case. This conclusion was reached in an opinion of this office to Olin B. Johnson, Prosecuting Attorney, Schuyler County, under date of April 29, 1954. A copy of said opinion is enclosed herewith.

CONCLUSION

Therefore, it is the opinion of this office that Section 279.010 does not authorize or direct the county court to pay a bounty for wolves, coyotes and wildcats other than animals of the full blood.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Donal D. Guffey.

Very truly yours,

John M. Dalton
Attorney General

DDG/ld

enc. (1)

PUBLIC SCHOOL RETIREMENT SYSTEM:

Funds of system may be used to pay expenses of election on coming under federal social security.



January 17, 1956

Mr. Ward E. Barnes
Chairman, Board of Trustees
Public School Retirement System
Room 801, Jefferson Building
Jefferson City, Missouri

Dear Mr. Barnes:

We have received your request for an opinion of this office, which request reads as follows:

"Senate Committee Substitute for Senate Bill 186 as enacted by the 68th General Assembly provides in Section 105.355.1. in part as follows: 'Upon the request of the governing body of a retirement system except in the case of the state colleges, state teachers colleges and retirement systems covering only one school district and then upon the request of the governing body of the college or school district, the governor shall authorize a referendum, and designate an agency or individual to supervise its conduct, in accordance with the requirements of section 218(d)(3) of the Social Security Act, on the question of whether service in positions covered by a retirement system established by the state or by a political subdivision thereof should be excluded from or included under an agreement under sections 105.300 to 105.440'

"The Board of Trustees of the Retirement System requested the Governor to authorize a referendum on the question of whether service in positions covered by the Public School Retirement System of Missouri should be excluded from or included under federal

Mr. Ward E. Barnes

social security coverage. Governor Donnelly has authorized such a referendum, and I have been designated to supervise the conduct of the referendum.

"From inquiry, we are unable to find that funds were appropriated by the General Assembly for the purpose of conducting a referendum of the teacher members of the Retirement System. I am, therefore, requesting an official opinion in answer to the following:

Can the Board of Trustees of the Public School Retirement System of Missouri legally authorize the expenditure of funds of the Retirement System for the purpose of conducting a referendum of the members of the system to determine whether the service in positions covered by the Retirement System shall be excluded from or included under Federal Social Security coverage?

"We will appreciate receiving this requested opinion at the earliest possible date since no action can be taken with regard to the referendum until the opinion has been received."

At the time of enactment of Missouri statutes extending federal social security coverage to state and local government employees, the federal law provided that coverage should not extend to employees who were at that time under a retirement system. A subsequent amendment to the federal act provided for the extension of coverage to such employees when authorized by a vote of the employees involved. Senate Committee Substitute for Senate Bill No. 186 of the 68th General Assembly, to which you refer, is designed to permit Missouri employees under retirement systems to take advantage of such coverage if they so elect.

The operation of the Public School Retirement System is financed wholly from contributions from teachers and employing school districts. By Section 169.110, RSMo 1949, no state funds are to be made available to finance the plan or to pay retirement allowances.

Mr. Ward E. Barnes

The retirement system act contains very few provisions relating to the use of funds for the payment of ordinary operating expenses of the system. Section 169.040, RSMo, 1955 Supp., provides, in part:

"1. All funds arising from the operation of sections 169.010 to 169.130 shall belong to the retirement system herein created and shall be controlled by the boards of trustees of that system, which board shall provide for the collection of said funds, shall see that they are safely preserved, and shall permit their disbursement only for the purposes herein authorized. * * *

Section 169.020(2), RSMo, 1955 Supp., provides as follows:

"The general administration and the responsibility for the proper operation of the retirement system and for making effective the provisions of sections 169.010 to 169.130 are hereby vested in a board of trustees of five persons, as follows: Two persons to be appointed as trustees by the state board of education; two persons to be elected as trustees by the members of the retirement system; the state commissioner of education who shall serve as trustee by virtue of his office."

We find no further provisions relating to the expenditure of funds of the system for the usual and ordinary expenses of its operation. In the absence of any further provision, it must be presumed that the Legislature intended that the trustees control expenditures from the fund and that they should have the authority to pay therefrom the reasonably necessary expenses of the operation of the system.

The cost of an election to determine whether or not members of the system should receive benefit of coverage under the Federal Social Security Act appears to us to be such an expenditure. The election is to be held by reason of the fact that the employees are now members of the system. The election is for the benefit of such employees. The Legislature, having made no other provision for payment of cost of the election, must have intended that the funds of the system should bear such cost.

Mr. Ward E. Barnes

CONCLUSION

Therefore, it is the opinion of this office that the Board of Trustees of the Public School Retirement System of Missouri may legally authorize the expenditure of funds of the retirement system for the purpose of conducting a referendum of the members of the system to determine whether service in positions covered by the retirement system shall be excluded from or included under federal social security coverage.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

Yours very truly,

JOHN M. DALTON
Attorney General

RRW:ml

SOCIAL SECURITY: Legislature only body authorized to
fix date on which service in positions
PUBLIC SCHOOL RETIREMENT SYSTEM: covered by Public School Retirement
System shall be included for coverage
under Social Security Act, subject to
referendum, and effective date must be
in conformity with federal law.

January 27, 1956



Mr. Ward E. Barnes
Chairman, Board of Trustees
Public School Retirement System
Room 801, Jefferson Building
Jefferson City, Missouri

Dear Mr. Barnes:

This is in response to your request for opinion dated
January 23, 1956, which reads as follows:

"A referendum of the teacher-members of the Public School Retirement System of Missouri was recently authorized by Governor Donnelly as provided for in Senate Committee Substitute for Senate Bill 186 as enacted by the last session of the General Assembly, and I was designated to supervise the conduct of the referendum. Section 105.355.1. provides that notice of the referendum be given to employees, and that the notice contain or be accompanied by information to inform the employees of the rights which will accrue to them and their dependents and survivors, and the liabilities to which they will be subject if their services are included under an agreement between the Secretary of Health, Education and Welfare, and the State of Missouri.

"In order that the information submitted to the eligible voters be complete with regard to rights and liabilities, it is necessary that we have information relative to the date on which coverage may become effective if the results of the referendum show that a majority of the eligible voters

Mr. Ward E. Barnes

have voted to be included under the agreement pertaining to the Old Age and Survivors Insurance System. We are uncertain who is authorized to determine the date on which coverage may become effective if the referendum indicates that coverage is desired. I am, therefore, requesting an official opinion in answer to the following:

1. Who is to determine the date on which service in positions covered by the Retirement System shall be included for coverage under an agreement?

2. What date or dates could be designated for coverage to commence by the person or agency charged with the responsibility of making the determination?"

Prior to the enactment of the 1954 amendments to the Social Security Act, persons in positions covered by retirement systems such as the Public School Retirement System of Missouri were excluded from coverage under the Social Security Act. In the 1954 amendments to Section 218 of that act this exclusion was removed and authorization given to the state to modify its agreement with the federal agency so as to include employees in positions covered by a retirement system if a majority of the eligible employees should vote in favor of such inclusion in a referendum conducted by the Governor or some individual or agency designated by him (Sec. 218(d)(3)).

Pursuant to these amendments, the 68th General Assembly of the State of Missouri enacted Senate Committee Substitute for Senate Bill No. 186 (Secs. 105.300 - 105.370, RSMo, Cum. Supp. 1955). By virtue of Subsection 6 of Section 218(d) of the federal act, the Legislature had the option of treating the employees of each political subdivision (school district) covered by the Public School Retirement System as a separate coverage group. In that event it would not have been necessary for all the school districts of the state to come under social security at the same time because, constituting separate coverage groups, the agreement between the state and federal agency could have been modified if and when individual districts elected to do so.

However, the Legislature, in Senate Committee Substitute for Senate Bill No. 186, elected to treat all employees under the

Mr. Ward E. Barnes

Public School Retirement System, with the exception of state colleges, as one coverage group and authorized the conducting of a state-wide referendum among all the eligible employees of the system. Regardless of what argument we might advance for the proposition that each district should be allowed to determine the effective date on which coverage under the Social Security Act would be extended to its employees, the fact remains that coverage can become effective only when the federal agency approves a modification to its agreement with the state. We have been advised by the regional attorney for the Department of Health, Education and Welfare (see attached letter) that since the Legislature has elected to treat the entire retirement system as one coverage group, the same effective date must be made applicable to all school districts of the state. Simply stated, if the modification of the state's agreement with the federal agency does not contain the same effective date for all school districts it will not be accepted.

Since the same effective date must be made applicable to each district, we arrive at your first question, i.e., who can fix this date?

Without prolonging this dissertation, let it suffice to say that no authority is vested in any person or any agency to dictate to the several school districts of this state that they shall extend social security coverage to employees under the Public School Retirement System at any date. School districts are creatures of the Legislature, amenable to its will, and in our opinion the Legislature is the only body clothed with the authority to fix the date on which service in positions covered by the Public School Retirement System shall be included for coverage under the Social Security Act, subject, of course, to the referendum.

The agreement between the state and the federal agency must be in conformity with the federal law. Therefore, the answer to your second question is contained in the 1954 amendment to Section 218(f) of the Social Security Act:

"(f) Any agreement or modification of an agreement under this section shall be effective with respect to services performed after an effective date specified in such agreement or modification; except that -

(1) in the case of an agreement or modification agreed to prior to 1954, such date may not be earlier than December 31, 1950;

(2) in the case of an agreement or modification agreed to after 1954 but prior to 1958, such date may not be earlier than December 31, 1954; and

(3) in the case of an agreement or modification agreed to during 1954 or after 1957, such date may not be earlier than the last day of the calendar year preceding the year in which such agreement or modification, as the case may be, is agreed to by the Secretary of Health, Education, and Welfare and the State.'"

CONCLUSION

It is the opinion of this office that the Legislature is the only body authorized to fix the date on which service in positions covered by the Public School Retirement System shall be included for coverage under the Social Security Act, subject, of course, to referendum of the eligible employees, and such effective date must be in conformity with federal law.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml
Enc.

STATE:
BANK:
CONSTITUTIONAL AMENDMENT:

Effective date of said constitutional amendment No. 3, approved by the voters on November 6, 1956, is thirty days after November 6, 1956. Surplus funds referred to therein may be placed in "Time Deposit - Open Account."



December 7, 1956

Honorable G. Hubert Bates
State Treasurer
State of Missouri
Jefferson City, Missouri

Dear Mr. Bates:

This will acknowledge receipt of your request for an opinion which reads:

"Since it is apparent that Amendment No. 3 received the majority of votes in the General Election held on November 6, 1956, and in order that I may comply with the provisions of said Amendment, I would like to have a legal opinion from your office in answer to the following questions:

1. On what date will this Amendment to the Constitution become effective?

2. If the effective date is during my term of office would any liability exist against me as State Treasurer if I should proceed to place surplus State funds on 'Time Deposit - Open Account'?

"Since my term of office is about to expire, I would appreciate an early reply to this inquiry."

Constitutional Amendment No. 3 is the same as Joint and Concurrent Resolution No. 1 adopted by the 68th General Assembly (Special Session) and was submitted to the voters and approved on November 6, 1956. This had the effect of repealing Section 15, Article IV, Constitution of Missouri, and reads:

"Section 15. The state treasurer shall be custodian of all state funds. All revenue collected and moneys received by the state from any source whatsoever shall go promptly into the state treasury, and all interest, income and returns therefrom shall belong to the state. Immediately on receipt thereof the state treasurer shall deposit all moneys in the

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more copying
box in vault

Honorable G. Hubert Bates

state treasury to the credit of the state in banking institutions selected by him and approved by the governor and state auditor, and he shall hold them for the benefit of the respective funds to which they belong and disburse them as provided by law. The state treasurer shall determine by the exercise of his best judgment the amount of state moneys that are not needed for current operating expenses of the state government and shall place all such moneys not needed for payment of the current operating expenses of the state government on time deposit, bearing interest, in banking institutions in this state selected by the state treasurer and approved by the governor and state auditor or in short term United States government obligations maturing and becoming payable one year or less from the date of issue or in other United States obligations maturing and becoming payable not more than one year from the date of purchase. The investment and deposit of such funds shall be subject to such restrictions and requirements as may be prescribed by law. Banking institutions in which state funds are deposited shall give security satisfactory to the governor, state auditor and state treasurer for the safekeeping and payment of the deposits and interest thereon pursuant to deposit agreements made with the state treasurer pursuant to law. No duty shall be imposed on the state treasurer by law which is not related to the receipt, investment, custody and disbursement of state funds."

Section 15, Article IV, Constitution of Missouri, 1945, prior to the adoption of the foregoing amendment read:

"All revenue collected and moneys received by the state from any source whatsoever shall go promptly into the state treasury, and all interest, income and returns therefrom shall belong to the state. Immediately on receipt thereof the state treasurer shall deposit all moneys in the state treasury to the credit of the state in banking institutions selected by him and approved by the governor and state auditor, and he shall hold them for the benefit of the respective funds to which they belong and disburse them as provided by law. Such institutions shall give security satisfactory to the governor, state auditor and state treasurer for the safekeeping

Honorable G. Hubert Bates

and payment of the deposits on demand of the state treasurer authorized by warrants of the state auditor. No duty shall be imposed on the state treasurer by law which is not related to the receipt, custody and disbursement of state funds."

You first inquire upon what date will the newly adopted amendment become effective. There is nothing in the amendment that indicates that it was the legislative intent that the effective date of said amendment shall be counter to the present constitutional amendment providing for the effective date of all amendments proposed by the General Assembly namely, Section 2(b) Article XII, Constitution of Missouri, which reads:

"All amendments proposed by the General Assembly or by the initiative shall be submitted to the electors for their approval or rejection by official ballot title as may be provided by law, on a separate ballot without party designation, at the next general election, or at a special election called by the governor prior thereto, at which he may submit any of the amendments. No such proposed amendment shall contain more than one amended and revised article of this Constitution, or one new article which shall not contain more than one subject and matters properly connected therewith. If possible, each proposed amendment shall be published once a week for two consecutive weeks in two newspapers of different political faith in each county, the last publication to be not more than thirty nor less than fifteen days next preceding the election. If there be but one newspaper in any county, publication for four consecutive weeks shall be made. If a majority of the votes cast thereon is in favor of any amendment, the same shall take effect at the end of thirty days after the election. More than one amendment at the same election shall be so submitted as to enable the electors to vote on each amendment separately."

(Underscoring ours.)

The next to last sentence in the foregoing amendment that we have underscored clearly fixes the effective date of any such amendment, which is, that it shall take effect at the end of thirty days after the election. The election was held on November 6, 1956, therefore, in view of the foregoing constitutional amendment the effective date of said amendment will be thirty days after November 6, 1956.

Honorable G. Hubert Bates

It now becomes necessary to determine if said constitutional amendment adopted on November 6, 1956, is self-executing or does it require an enabling act of the Legislature to carry out the provisions thereof.

The well-established and controlling principle of law in determining if a constitutional amendment is self-executing, is whether said amendment can become effective without the aid of legislation. In *State ex inf. McKittrick v. Wymore*, 119 S. W. 2d 941, 1.c. 947, 343 Mo. 98, 119 A.L.R. 710, the Supreme Court of Missouri, said:

"* * * The rule is stated in *State ex inf. Norman v. Ellis*, 325 Mo. 154, loc. cit. 160, 28 S.W. 2d, 363, loc. cit. 365, as follows:

"'It is within the power of those who adopt a constitution to make some of its provisions self-executing, with the object of putting it beyond the power of the legislature to render such provisions nugatory by refusing to pass laws to carry them into effect. * * *

"'Constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty imposed." * * *

"'A Constitutional provision designed to remove an existing mischief should never be construed as dependent for its efficacy and operation on the legislative will.'" 12 C. J. pp. 729, 730."

In *State v. Smith*, 194 S.W. 2d 302, 1.c. 304, the court also approved said rule and said:

"[2,3] We are of the opinion that the mooted constitutional provision, the text of which is set forth in the margin, is not subject to the foregoing construction. 'One of the recognized rules is that a constitutional provision is not self-executing when it merely lays down general principles, but that it is self-executing if it supplies a sufficient rule by means of which the right which it grants may be enjoyed and protected, or the duty which it imposes may be enforced, without the aid of a legislative enactment. * * * Another way of stating this general, governing principle is that a constitutional provision is self-executing if there is nothing to be done by

Honorable G. Hubert Bates

the legislature to put it in operation. In other words, it must be regarded as self-executing if the nature and extent of the right conferred and the liability imposed are fixed by the Constitution itself, so that they can be determined by an examination and construction of its terms, and there is no language indicating that the subject is referred to the legislature for action.' * * *

In *State v. Smith*, supra, l.c. 305 and 306, the court also had this to say about said constitutional amendment being self-executing:

"* * * These are subjects which undoubtedly may be dealt with by the legislature. 'Minor details may be left for the legislature without impairing the self-executing nature of constitutional provisions.' 11 Am. Jur. Constitutional Law, § 73, p. 691. But, as pointed out in *Cooley's Constitutional Limitations*, 7th Ed., 122 'Perhaps even in such cases [certain self-executing provisions] legislation may be desirable * * *; but all such legislation must be subordinate to the constitutional provision, and in furtherance of its purposes, and must not in any particular attempt to narrow or embarrass it.' The constitutional grant to issue and sell revenue bonds carries with it by implication such other necessary powers as are needed to carry the granted authority into effect. The constitution being silent on the subject of the provisions to be recited in such bonds, and there being no statutory limitation applicable to the challenged provision, we think the city had the implied authority to prescribe, as one of the inducements to prospective holders, and thus favorably affect the value and marketability of the bonds, that any subsequent issue of like bonds should be junior and subordinate to the issue in question."

In *State v. Smith*, supra, the court approved the decision in *State ex rel. Clark Co. v. Hackman*, 280 Mo. 686, 218 S.W. 318, wherein the question arose as to whether a constitutional amendment was self-executing. The amendment for construction in that case granted power to counties to create certain debts for county purposes, when approved by a prescribed majority, however, said constitutional amendment provided no machinery for the election. The court held that it was sufficient in view of the fact that in holding said election they used the ordinary or usual machinery provided by law for expression of voters upon questions and, there-

Honorable G. Hubert Bates

fore, the constitutional amendment was self-executing.

In *State v. Ellis*, 28 S.W. 2d 363, 1.c. 365, the court again announced the foregoing rule as to how to determine if a constitutional amendment is or is not self-executing.

See also *Miller v. Wilson*, 129 P. 2d 668, 670, 671, 59 Ariz. 403.

State ex rel. Stafford v. Fox Great Falls Theater Group, 132 P. 2d 689, 699, 700, 114 Mont. 52.

Certainly it is not difficult to comprehend the purpose of this amendment, it was to prevent the state's losing so much revenue in the form of interest on revenue placed in banks or banking institutions by the state treasurer. There is one particular sentence in the new amendment that it might be well to mention in determining if said constitutional amendment is or is not self-executing, namely: " * * * the investment and deposit of such funds shall be subject to such restrictions and requirements as may be prescribed by law."

In construing the foregoing sentence in said amendment, there is a rule of statutory construction applicable, namely, that generally in statutes the word "may" is permissive only, and the word "shall" is mandatory. See *State ex inf. McKittrick v. Wymore*, supra; *Warrington v. Bobb*, 56 S.W. 2d 835; *State ex rel. and to the use of Dietrich, et al. v. Schade*, 167 S.W. 2d 135.

Applying the following rule to the foregoing sentence we construe it to mean that such investments and deposits referred to shall be subject to any restrictions and requirements should the General Assembly choose to enact same, however, in the absence of any such legislation said provision is self-executing.

We believe this constitutional amendment adopted by the voters on November 6, 1956, sufficiently provides what shall be done with such revenue without the necessity or aid of any enabling legislation, even to the extent that such banking institutions wherein such state funds shall be deposited shall give satisfactory security to certain specified officials of the state, pursuant to deposit agreements made with the state treasurer, pursuant to law.

The General Assembly heretofore has enacted laws that may be invoked for executing such agreements, etc. Sec. 30.250, MoRS 1949, provides for a contract with the depository. Furthermore, Sec. 30.270, MoRS 1949, Cum. Supp. 1955, specifically provides the kind and character of security for funds deposited by the state treasurer.

Section 30.250, supra, reads:

Honorable G. Hubert Bates

"1. The state treasurer shall enter into a written contract in quadruplicate with each depositary setting forth the conditions and terms upon which the funds of the state are deposited therewith and containing among its provisions and conditions the following:

(1) The amount of the moneys of the state to be entrusted to each depositary;

(2) The time such agreement shall continue with the right reserved to each the state treasurer and the state depositary to terminate the agreement at any time upon giving thirty days' notice to the other party of his or its intention to do so;

(3) The rate of interest to be paid by the depositary to the state whenever banks and banking institutions should be permitted to pay interest or a bonus on state deposits;

(4) That such depositary shall safely keep said deposits and shall pay off the same only upon the written demand of the state treasurer in the form of checks or drafts, when he shall be authorized by warrant of the state auditor;

(5) That such depositary shall secure the state funds with the amount and character of securities provided for in Section 30.240 of this act, such securities to be held by the state treasurer in the vaults of the state, or in the vaults of such bank, trust companies or safe depositaries as the state treasurer may designate with the consent of the governor and the state auditor, and at the expense of the depositary;

(6) That no item of security deposited by a depositary under the terms of the contract shall be withdrawn without the written consent of the governor, state auditor and state treasurer;

(7) That the depositary shall, at the end of each month, render to the state treasurer a statement in triplicate showing the daily balances or amount of money held by it during the month and the amount of accrued interest thereon, if any;

Honorable G. Hubert Bates

(8) That in the event the depository shall default in any manner in performing any of the terms and conditions of the contract, or shall fail to safely keep the funds of the state deposited with it, the state treasurer shall be authorized forthwith without notice, advertisement or demand, and at public or private sale to convert into money the securities deposited, or as many of them as may be necessary to pay the whole amount of the state deposits in such depository.

"2. Upon the execution of such contracts the state treasurer shall deliver a copy thereof to the state auditor, a copy thereof to the governor, shall file another with the secretary of state, and shall retain the remaining copy in his own office."

All the conditions hereinabove quoted in Section 30.250, supra, should be a part of such agreement with the exception of subsection 4 under paragraph 1, which is in conflict with the provisions of the new constitutional amendment, in that the law no longer requires demand deposits of moneys not needed for current operating expenses but now requires that moneys not needed for current operating expenses of the state government shall be placed on time deposit or in short term United States government obligations.

Surely the 68th General Assembly in adopting Joint and Concurrent resolution No. 1, which is the same constitutional amendment adopted on November 6, 1956, and referred to in your request, in referring to "time deposit, bearing interest" had in mind the definition of time deposit as contained in Section 362.010, Subsection 14 and Section 363.010, Subsection 13, V.A.M.S. Both provisions read:

"When used in this chapter, the term:

* * * * *

"'Time deposits' means all deposits, the payment of which cannot legally be required within thirty days."

There is a well established rule of construction that laws are presumed to be drafted with full knowledge of all existing ones on the subject. *Smith v. Pettis County*, 136 S.W. 2d 282, 345 Mo. 839; *Howlett v. Social Security Comm.* 149 S.W. 2d 806, 347 Mo. 784, certified from 146 S.W. 2d 94, 236 Mo. App. 231.

Honorable G. Hubert Bates

We understand that "Time Deposit - Open Account" means an account where notice of not less than thirty days in advance of withdrawal must be given by the depositor.

Therefore, we see no reason why said state revenue permitted to be deposited under said constitutional amendment cannot be deposited in "Time Deposit - Open Account."

CONCLUSION

Therefore, it is the opinion of this department:

- 1) That the effective date of said constitutional amendment is thirty days after November 6, 1956.
- 2) That such surplus funds may be placed in "Time Deposit - Open Account."

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Aubrey R. Hammett, Jr.

Yours very truly,

JOHN M. DALTON
Attorney General

ARR/mw/bi

PROSECUTING ATTORNEY:
CRIMINAL COSTS:
CRIMINAL LAW:



Under the provisions of Sec. 56.310 RSMo 1949, the prosecuting attorney shall be allowed a fee of \$12.50 for the conviction of a defendant charged with armed robbery under the general criminal law, regardless of whether said defendant is committed to the State Board of Training Schools, or punishment is assessed at confinement in the State Penitentiary.

July 3, 1956

Honorable William T. Bellamy, Jr.
Prosecuting Attorney
Saline County
Marshall, Missouri

Dear Mr. Bellamy:

Reference is made to your request for an official opinion of this office, which request reads as follows:

"Differences have arisen between Mr. O. L. Peters, Supervisor of Criminal Costs of the Department of Revenue, Miss Edna Giger, our Circuit Clerk, and myself over the fee allowable to the Prosecuting Attorney under the provisions of Section 56.310 in a case where the defendant was charged with Armed Robbery and pled guilty to that charge and was sentenced to the Missouri State Board of Training Schools rather than to the penitentiary.

"In the particular case, the defendant was a young lady eighteen years old and under the provisions of Section 219.160, in the Court's discretion, was sentenced to the Training School at Chillicothe rather than to the penitentiary because it was the opinion of both the sentencing judge and prosecuting attorney that there was a possibility of rehabilitation.

"In any event, it is my feeling, as well as that of Miss Giger, that a conviction for Armed Robbery carries with it a fee of \$12.50 automatically regardless of the institution to which the defendant is sentenced. It was Mr. Peters' belief that there was a previous Attorney General's opinion holding that the state had authority to pay a prosecuting attorney fee only on a penitentiary sentence. It seems to me that Section 56.310 makes a special exception in the case of robbery to the usual rule.

"I would appreciate an opinion of clarification on this matter at your earliest convenience."

Honorable William T. Bellamy, Jr.

Pursuant to our inquiry, you have supplied us with the additional information that the defendant in the case referred to was charged and convicted under the general criminal law and not under the juvenile code.

Section 56.310 RSMo 1949, provides in part as follows:

"Prosecuting attorneys shall be allowed fees as follows, unless in cases where it is otherwise directed by law: * * * for the conviction of every defendant in any case where the punishment assessed shall be by confinement in the penitentiary, except in cases of rape, arson, burglary, robbery, forgery or counterfeiting, ten dollars; for the conviction of every defendant of homicide, other than capital, or for offenses excepted in the last clause, twelve dollars and fifty cents; * * *".

Section 219.160 RSMo 1949, provides that upon conviction, a girl over the age of twelve years and under the age of twenty-one years may be committed to the state board of training schools. Said section reads as follows:

"Any boy over the age of twelve years and under the age of seventeen years and any girl over the age of twelve years and under the age of twenty-one years who has been convicted of a crime or who is found by the juvenile or circuit court to be in need of training school education and discipline may be committed to the state board of training schools. Except where a child who is convicted of a crime and sentenced for a period of time which will not expire until after his twenty-first birthday, all commitments to the board shall be made for an indeterminate period of time."

In the case recited, the defendant, a young lady eighteen years of age, plead guilty to a charge of armed robbery and was thereupon committed to the state board of training schools. The authority for such commitment is contained in Section 219.160, supra.

We note that Section 56.310 RSMo 1949, provides that the prosecuting attorney shall be allowed a fee of ten dollars for the conviction of every defendant in any case "where the punishment assessed shall be confinement in the penitentiary", except in cases of rape, arson, burglary, robbery, forgery or counterfeiting. The following clause of such section provides that the prosecuting attorney shall be allowed a fee of twelve dollars and fifty cents "for the conviction of every defendant of homicide, other than capital, or for the offenses excepted in the

Honorable William T. Bellamy, JR.

last clause" (rape, arson, burglary, robbery, forgery or counterfeiting). No requirement is herein contained that upon "conviction" the defendant's punishment must be assessed at confinement in the penitentiary. The word "conviction", as used in Section 56.310, has been held to mean a judgment in favor of the state in a criminal case on the merits. In re Murphy, 22 Mo. App. 476. Certainly the case which you have outlined would fall within this definition.

CONCLUSION

Therefore, it is the opinion of this office that, under the provisions of Section 56.310 RSMo 1949, the prosecuting attorney shall be allowed a fee of twelve dollars and fifty cents for the conviction of a defendant charged with armed robbery under the general criminal law, regardless of whether said defendant is committed to the state board of training schools, or punishment is assessed at confinement in the state penitentiary.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

Very truly yours,

John M. Dalton
Attorney General

DDG/ld

PAUPERS: County may recover from person obligated to support an indigent insane person or from such insane person's estate amounts expended by it for support of such insane person, but cannot recover from anyone amounts expended for support of other poor persons.

COUNTIES:

INSANE:



March 19, 1956

Honorable Max B. Benne
Prosecuting Attorney
Atchison County
Rock Port, Missouri

Dear Mr. Benne:

This is in response to your request for opinion dated March 1, 1956, which reads as follows:

"I have been asked by the County Court of this County to advise them of their right to recover from a pauper or his estate the amount of aid given to said person for his care or support. The typical case is where a person has a modest home worth perhaps \$1,500.00, and upon his death the County files a claim in Probate Court for the amount of aid rendered him during his lifetime. I assume no fraud or deceit.

"There seems to be no cases listed in the Missouri digest under Section 40 of Paupers. There is to be found in Foster vs. Fraternal Aid Union, App. 87 SW2d 669 @671 some dicta on the question. Other material is found in 70 C.J.S. 129-134.

"I would much appreciate an opinion from your office concerning the rights of the County in these matters."

For sake of convenience, we shall set forth the applicable portion of the citations referred to by you in your request. 70 C.J.S., Paupers, Section 64, page 129, reads as follows:

"While there is some authority to the effect that at common law a poor person or his estate is liable for his support and maintenance at public expense, as a general rule, in the absence of contract or of some express statutory

Honorable Max B. Benne

provision, where public authorities relieve a pauper, pursuant to their statutory obligation, neither the pauper nor his estate after his death is under any obligation to make reimbursement; and this is the rule even though the pauper owned property at the time the relief was furnished, in the absence of fraud or deception on his part as to his ability to support himself, or although he subsequently became of sufficient ability to repay."

The dictum referred to, contained in *Foster v. Fraternal Aid Union*, Mo. App., 87 SW2d 669, 671, is as follows:

"It may be true that Jackson county, having duly accepted Warren T. Davis and Julia C. Davis, his wife, as poor persons, into the Jackson County Home for the Aged and Infirm, with no provision for the repayment of such expense, is not entitled to recover the amount thereof from Julia C. Davis estate. Article 4, chapter 90, R.S. Mo. 1929 (Mo. St. Ann. c. 90, art. 4 Sec. 12950 et seq., p. 7474 et seq.); 48 C.J. pp. 519, 544; *Chariton County v. Hartman*, 190 Mo. 71, 77, 88 S.W. 617. But that is something that will not assist intervenor in her claim."

Although the C.J.S. quotation indicates that in some jurisdictions, i.e., Pennsylvania and the District of Columbia, even in the absence of a statute for a contract to repay, the county could recover from an indigent person or his estate the amount expended on his behalf by the county, it is not necessary to analyze or distinguish those cases from those representing the contrary view, which is apparently the one which prevails in most jurisdictions, because from the Missouri cases it is quite clear which line of cases the Missouri courts follow.

In *Montgomery Co. v. Gupton*, 139 Mo. 303, the deceased had in her lifetime been adjudged an indigent insane person and maintained in the State Lunatic Asylum as a county patient. Upon her death this action for recovery of the amounts expended by the county was brought against her estate. The lower court granted judgment for the plaintiff county, which was reversed by the Supreme Court. In disposing of the case the court said, l.c. 308:

"It is well settled at common law that the provision made by law for the support of the poor is a charitable provision, from which no implication of a promise to repay arises, and moneys so expended can not be recovered of the pauper, in the absence of fraud, without a special contract for repayment. Selectmen of Bennington v. McGennes, 1 D. Chipp. 44; Benson v. Hitchcock, Adm'r, 37 Vt. 567; Inhabitants of Deer-Isle v. Eaton, 12 Mass. 328; Inhabitants of Stow v. Sawyer, 3 Allen, 515; Charleston v. Hubbard, Adm'r, 9 N.H. 195. A person so relieved, whether he had or had not property, never was liable to an action for such relief at common law. Inhabitants of Groveland v. Inhabitants of Medford, 1 Allen, 23. 'The misjudgment of the officers of the poor as to the necessities of the person relieved, raises no implied promise on the part of such person that he will repay moneys expended in his behalf. City of Albany v. McNamara, 117 N.Y. 168. In view of these well settled principles of the common law, in many of the States laws have been enacted authorizing the recovery, by suit against the pauper, of moneys expended in his support. Such is the case in Pennsylvania, and it was upon a statute of this character that a recovery was upheld in Directors v. Nyce, 161 Pa. St. 82. But we have no statute of similar import. The only statute we have authorizing a recovery against any person for money expended in support of paupers is Section 5557, by which it is provided that:

"In all cases of appropriations out of the county treasury for the support and maintenance or confinement of any insane person, the amount thereof may be recovered by the county from any person who, by law, is bound to provide for the support and maintenance of such person, if there be any of sufficient ability to pay the same.'

"Counsel for respondent insist that under this statute a recovery is authorized in this case, and the question is gravely asked: 'If an

Honorable Max B. Benne

action can be maintained against one who is legally liable for the support of the patient on account of an appropriation by the county, why could it not be maintained against the individual himself, or in case of his death against his administrator?' The obvious answer is: Because the right of action is purely a creation of the statute, and the statute gives it in the one case, and does not in the other. There is no principle of statutory construction to warrant the assumption that 'a legal liability being upon others, if they are able pecuniarily to pay for the patient's support, the law will imply a promise on the part of the patient to pay for it himself, if able pecuniarily.' Upon which the judgment in this case seems to have been based. The deduction is a palpable non sequiter and to give it effect is simply judicial legislation. Whatever argument may be urged in support of the proposition that such ought to be the law should be addressed to the legislature and not to the courts. The judgment is reversed. * * *

See also Chariton County v. Hartman, 190 Mo. 71, 77, 88 SW 617, and the cases collected in 125 A.L.R. 712.

The statute quoted in the Montgomery County case allowing recovery from the person legally bound to provide for the support and maintenance of an insane person maintained at county expense was amended in 1927, adding the proviso that the county could also recover from the estate of such insane person. Section 202.260, RSMo 1949, now reads:

"In all cases of appropriation out of the county treasury for the support and maintenance or confinement of any insane person, the amount thereof may be recovered by the county from any person who, by law, is bound to provide for the support and maintenance of such person, if there be any of sufficient ability to pay the same, and also the county may recover the amount of said appropriations from the estate of such insane person."

See Barry County v. Glass, Mo. App., 160 SW2d 808.

Honorable Max B. Benne

It is interesting to note that even before this statute was amended, allowing recovery against the estate of such insane person, recovery was obtained in City of St. Louis v. Hollrah, 175 Mo. 79, the court holding that the defense was an affirmative one which must be pleaded. Another interesting case is Audrain County v. Muir, 297 Mo. 499, 249 SW 383, holding that a husband is under no obligation to provide for his wife's necessities while she is living apart from him without fault on his part, and consequently under those facts recovery cannot be had against him under that section.

Although because of Section 202.260, supra, recovery can now be had against either the person legally obligated to provide for the support and maintenance of an indigent insane person or against the estate of such insane person, we believe it quite clear from the case of Montgomery County v. Gupton, supra, that, in the absence of fraud or an express contract to repay, no recovery can be had from anyone for the support and maintenance of other poor persons maintained at county expense because there is no statute allowing such recovery.

CONCLUSION

It is the opinion of this office that a county may recover from either a person legally obligated to provide support and maintenance for an indigent insane person or from the estate of such insane person the amounts expended by the county for the support and maintenance of such insane person, but that, in the absence of fraud or deceit or an express contract to repay, the county cannot recover from anyone amounts expended by it for the support and maintenance of other poor persons.

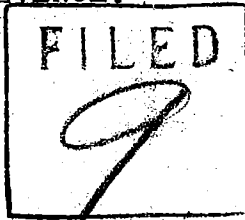
The foregoing opinion, which I hereby approve, was prepared by my assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI/ml/b1

CIGARETTE TAX:
ACTION BY THE
DEPARTMENT OF
REVENUE:



Representatives of the cigarette tax division should make estimates of the tax and penalties due against a seller of unstamped cigarettes when the seller is known, and against the retailer when the seller is unknown.

March 16, 1956

Honorable Frank Blankenship
Supervisor of Cigarette Tax
Division of Collection
Department of Revenue
Jefferson Building
Jefferson City, Missouri

Dear Mr. Blankenship:

You recently stated your request for an opinion of this office as follows:

"Senate Bill 351, 68th General Assembly, Section 6, paragraphs 1, 2 and 3, provides certain penalties for failure to properly stamp cigarette packages for sale.

"Please give me an opinion as to the procedure a representative of this department should use when he discovers cigarettes for sale in a retail establishment, if cigarette tax stamps have not been affixed to packages."

Section 8 of the Act, 149.080, 1955 Cumulative Supplement, Mo. R.S., requires that the retailer keep records showing the sales made and the commodities received.

Section 9, 149.090, 1955 Cumulative Supplement, requires him to permit the representative of your department to examine his records, papers, files and equipment.

It will be presumed, therefore, that your question is directed toward the situations when the retailers refuse such permission. Section 144.060 provides that a penalty, to be in the same amount as the tax, shall be "assessed and collected * * * as sales taxes are collected," when the person who is required to do so fails to affix the stamps.

Section 144.210, RSMo 1949, provides authority to estimate the amount of sales tax whenever a taxpayer fails or refuses to make the proper returns.

Honorable Frank Blankenship

We can find no authority, either specifically in the cigarette tax act or generally in other acts, that gives the representative of the tax department the authority to search the premises of the retailer in order to determine the number of unstamped cigarettes on hand, if the retailer refuses permission to examine his stock and records and equipment. It, therefore, seems necessary for the representative to make an estimate of such amounts so as to determine the amount of the tax and the penalty.

It appears from the wording of paragraph 1 of Section 149.060 of the cigarette tax act that it was contemplated that both the tax on the cigarettes and the penalty are to be collected "as sales taxes are collected." This, we think, is to be the practice when that tax has not been "paid by affixing stamps" at the time of the original sale in this state, as is provided by paragraph 2 of Section 2 of the Act, now 149.020, 1955 Cumulative Supplement.

The procedure we have suggested above would be applicable, of course, if the retailer had on hand cigarettes not purchased in this state and in the situations when he had purchased them within the state and refuses to give the representative the information as to how many and from whom purchased.

When the identification of the person who first sells the cigarettes can be determined, the tax and the penalty can be "assessed and collected" from him "as sales taxes are collected." You will note that paragraph 1 of Section 149.060 states that the penalty shall be assessed and collected against "Any person who fails to affix the stamps within the time and manner required of him by this act * * *." And, as mentioned above, the time that is set is the time of the original sale in this state.

CONCLUSION

It is, therefore, the conclusion of this department:
(1) that the representative of the division of collection, Department of Revenue, upon discovering upon the premises of a retailer cigarettes to which no stamps have been affixed, should attempt to determine the seller of such cigarettes and attempt to determine the amount the retailer has on hand. Following the acquisition of such information, the

Honorable Frank Blankenship

tax and penalty should be assessed against the seller as all estimated sales taxes are assessed; (2) that whenever the seller of the cigarettes cannot be determined, such estimated tax and penalty should be assessed and collected against and from the retailer.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Russell S. Noblet.

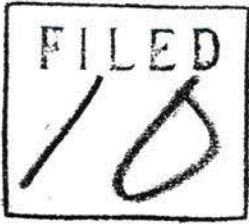
Very truly yours

John M. Dalton
Attorney General

RSN:lc

SCHOOLS: School district, in absence of qualifying factors, may not give property to church organization. Such attempted transfer enjoinable by state at relation of prosecuting attorney.

SCHOOL DISTRICTS:



March 1, 1956

Honorable Paul Boone
Prosecuting Attorney
Ozark County
Gainesville, Missouri

Dear Mr. Boone:

This is in response to your request for opinion dated December 17, 1955, which reads as follows:

"Your official opinion is requested in connection with the manner of sale or disposition of school buildings and sites which are no longer needed for school purposes.

"A Consolidated School District in this county has two school sites and buildings which were previously used for school, but are no longer used because the students in the respective communities are now being transported to the central building in the district.

"The Board of Directors of the Consolidated District desire to dispose of the buildings and site in the manner required of them by law. It was not contemplated to sell the cemetery located on the property, but it is the desire of the Board to dispose of the other property.

"The residents of the community where each of the two sites and buildings are located have expressed a desire to retain the buildings in the community for church and other public purposes, although it is feared that some person would bid an amount in excess of

Honorable Paul Boone

the amount the local church or other organization would be able to pay in the event the property were advertised and sold in the manner provided by Section 165.370 Revised Statutes of Missouri, 1949.

"The County Superintendent of Schools of this County has written a letter of the State Department of Education explaining the local situation, and asking if the Board of Directors could convey the property to a local organization without a consideration, or for a nominal consideration. An answer has been received to that letter suggesting that the Board of Directors advertise the property for sale under the provisions of Section 165.370, and then reject the higher bids, if any, and accept the bid offered by the local organization of \$1.00, etc. A copy of the reply signed by Geo. D. Enhlehart, Director School Building Services, is enclosed.

"Your opinion is therefore requested as to whether or not the Board of Directors would be within the law by following the procedure outlined in the letter, or whether or not the Board of Directors would be liable under the law in the event of a bid for \$500.00 which would be rejected in favor of a bid for \$1.00 and good will as suggested in the letter?"

Section 165.370, RSMo 1949, to which you have referred in your letter, provides, in part:

" * * * whenever there is within the district any school property that is no longer required for the use of the district, the board is hereby authorized to advertise, sell and convey the same, and the proceeds derived therefrom shall be placed to the credit of the building fund of such district."

It has been suggested that, under the factual situation outlined in your request, the board, after advertising the property for sale, would be authorized to reject all other bids which might be received and sell the property to a local church organization

Honorable Paul Boone

for a nominal figure, which in essence would amount to a gift to such organization.

With regard to school property, it must be borne in mind that school districts are mere instrumentalities of the state in discharging the duty of providing free education to the youth of the state. Although they are bodies corporate and constitute separate legal entities, they are statutory trustees for the state in carrying out this important function. In fact, it has been held that the property of a district acquired from public funds is state property and not the private property of the school district. In *School Dist. of Oakland v. School Dist. of Joplin*, 340 Mo. 779, 102 SW2d 909, 915, the court said:

" * * * In Missouri the property of school districts acquired from public funds is the property of the state, not the private property of the school district in which it may be located, and the school district is a statutory trustee for the discharge of a governmental function entrusted to the state by our Constitution."

We have found no case in Missouri passing directly on the question which you have presented, but there is a very analogous one from the state of Arizona. In *Prescott Community Hospital Commission v. Prescott School Dist. No. 1 of Yavapai County*, 57 Ariz. 492, 115 P2d 160 (1941), the defendant school district leased certain property to the plaintiff for the purpose of maintaining a community hospital. The term of the lease was for five years at an annual rental of one dollar. The lease was subject to renewal for further terms of five years indefinitely. The only provision for termination was in case the premises were totally destroyed.

The court looked behind the form of the agreement and found that in effect it was a gift to the hospital commission; that it was not meant for the benefit of the defendant or of both parties but for the benefit of the plaintiff entirely. At l.c. 161 the court stated:

"School districts are created by the state for the sole purpose of promoting the education of the youth of the state. All their powers are given them and all the property which they own is held by them in trust for

Honorable Paul Boone

the same purpose, and any contract of any nature which they may enter into, which shows on its face that it is not meant for the educational advancement of the youth of the district but for some other purpose, no matter how worthy in its nature, is ultra vires and void.

* * * * *

" * * * (cases cited) While these cases differ as to the result reached, so far as the validity of the particular leases in question are concerned, yet we think they all recognize the principle that any disposition of school property must be for the benefit of the district and not a gift to other parties.

"It is doubtless true that the maintenance of a hospital in the city of Prescott is a most praiseworthy objective, and that contributions for that purpose by those individuals or organizations which are legally permitted to make them are most commendable, but school districts are not permitted to give away the property of a district even for the most worthy purpose, and since it appears clearly by the terms of the lease that this is its practical effect, we hold that it is ultra vires and void."

Under the facts of a given case, the board might be justified in considering the use to which the land being sold is to be put and reject a higher bid as not the best bid considering that factor. For example, in *Gatliff v. Inman*, 131 Ky. 233, 115 SW 254, the court held that the board acted in good faith and in the best interest of the district when it sold land adjoining the school building to a representative of a church for a lesser sum than was bid by others. The court said, SW 1.c. 256:

" * * * Again, in the exercise of their discretion, the trustees would have the right to prefer that the property which they were selling should be used for church purposes rather than for something else, if the remainder of the property was to be continued as a site for school purposes. * * * The presence of a church near a schoolhouse and grounds we apprehend could not

Honorable Paul Boone

in any state of case be objectionable, but many other buildings might be and many uses to which the ground might be put would be very objectionable, and the trustees of the school would be warranted in refusing to sell the ground to one who would use it for the conduct of a business that would be injurious to the health or morals or best interests of the school children, so that the use to which the ground is to be put is a proper element for the consideration of the trustees in the conduct of the sale. They knew what it was to be used for if bought by the church people, and, knowing the other bidders to be opposed to its sale and entertaining views hostile to theirs, we are not prepared to say that they acted against the best interests of the school in refusing to accept the bid of those whom they did not believe to be acting in good faith, and in making the sale, as they did, to the agent for the trustees of the church."

In addition to the fact that the board intended to conduct school on the land immediately adjacent to the ground being sold at the time the sale was made, the court found evidence that the higher bids were not made in good faith and permitted the sale to stand. However, the court said, l.c. 255:

" * * * As above stated, the trustees are supposed to act for the best interests of the district. They would not be required to approve a sale to a bidder whom they knew was unable to pay for the property, nor would they be required to recognize a bid for the property if they knew that it was not made with the intention of receiving and paying for the property, but only for the purpose of thwarting their plans and preventing the sale from being made. On the other hand, they should not let mere suspicion and doubt cause them to reject a good bid and accept one for a less price merely because they were of opinion that the high bidder was not acting in good faith. The proper course for them to have pursued in the case at bar would have been to accept each high bid in turn, and give the bidder a reasonable time and opportunity to comply with the terms of the sale, and when each had in turn failed, if they did fail, then and only then should they have accepted the bid of \$250. * * *"

Honorable Paul Boone

Since none of the modifying factors in the Gatliff case is brought to our attention in the facts presented here, we are of the opinion that the reasoning of the Arizona case is applicable and that, regardless of the meritoriousness of the purpose for which the property would be used, such a gift, which would be the practical effect of a transfer for one dollar and "good will," would be ultra vires and void.

This conclusion is consistent with the prior opinion of this office rendered to Honorable Floyd L. Snyder, Sr., on January 5, 1951, copy enclosed, wherein it was held that a school district did not have the authority to give property of the district to the state of Missouri for armory purposes.

Inasmuch as we are viewing this question before the transfer is made, we do not deem it necessary to determine whether the board of directors would be individually liable if the procedure outlined in your letter were followed. If it should be attempted, the proper procedure would be for the state, at the relation of the prosecuting attorney, to intervene and enjoin the illegal transfer, or if completed, to sue to have it set aside as being ultra vires and void.

In State to Use of Consol. School Dist. No. 42 of Scott County v. Powell, 359 Mo. 321, 221 SW2d 508, 510, 512, the court stated:

"Appellants concede that the state might have intervened to prevent the illegal transfer and use of the Teachers' Fund for other purposes than the purpose provided by statute. There is no contention that the prosecuting attorney would not have been the proper official to act and represent the state in such a case. In this connection see State ex rel. Thrash v. Lamb, 237 Mo. 437, 450, 141 SW 665; State ex rel. Big Bend Quarry Co. v. Wurdeman, 309 Mo. 341, 274 SW 380, 382; State ex rel. Westhues v. Sullivan, 283 Mo. 546, 224 SW 327, 331; State ex rel. Circuit Attorney v. Saline County Court, supra.

* * *

* * * * *

" * * * As stated, the right of the state at the relation of the prosecuting attorney to intervene and enjoin such illegal transfers and expenditures is not questioned. The interest and concern of the state in intervening and stopping such an illegal disposition of public funds is not questioned. We think that

Honorable Paul Boone

the right of the state by the prosecuting attorney of the county to intervene in such case and to recover, on behalf of the state and the school district, the amounts so illegally diverted and spent rests upon sound public policy and upon express authority granted by statute. * * *

CONCLUSION

It is the opinion of this office that a school district, in selling property no longer needed for district purposes, in the absence of qualifying factors, does not have the authority to reject higher bids in favor of a nominal one and to convey such property to a religious organization, regardless of how praiseworthy its objective may be, for such nominal consideration. Such a transfer would in effect amount to a gift and would be ultra vires and void.

It is the further opinion of this office that an attempted transfer under the facts outlined herein would be subject to injunction by the state at the relation of the prosecuting attorney.

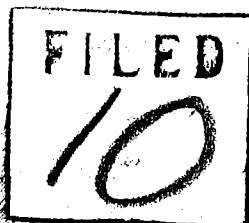
The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml
Enc.

SCHOOLS: Plan of reorganization of school districts
SCHOOL DISTRICTS: may not divide existing reorganized districts.



November 15, 1956

Honorable Paul Boone
Prosecuting Attorney
Ozark County
Gainesville, Missouri

Dear Mr. Boone:

This is in response to your request for opinion of recent date, which reads as follows:

"I would appreciate your official opinion concerning a change of boundary lines of a school district reorganized under the provisions of Chapter 165, R.S. No. 1949.

"After a school district has been enlarged or organized under the provisions of Chapter 165, R.S. No. 1949, does the County Board of Education have the authority to include any portion of the reorganized district in the territory of another proposed enlarged adjoining district?

"After a common school district has been annexed to an enlarged school district under the provisions of Section 165.300, R.S. No. 1949, does the County Board of Education have the authority to include the annexed portion of such enlarged district in the territory of another proposed enlarged adjoining district?"

On January 14, 1949, this office rendered an opinion to Honorable Hubert Wheeler, copy enclosed, wherein it was held that the county board of education in proposing enlarged districts did not have the power to divide an existing district, that the plan of reorganization must include the whole district and not merely a part thereof.

Honorable Paul Boone

In 1955, the Legislature enacted House Bill No. 56, now Section 165.685, RS, Cum. Supp. 1955, which reads as follows:

"In recommending proposed reorganization plans, the county board of education may divide existing unreorganized districts if such division is in the best interests of the children, and place any portion in any proposed enlarged district. If a portion of the territory of any district has been incorporated in a reorganized district, the remaining part may elect to become a part of an adjoining district. For the purpose of such election the qualified voters of such part of a district shall call a special meeting and vote on the proposition as provided in section 165.300. If the remaining part of any divided district fails to become a part of a reorganized district within sixty days and does not meet the requirements of section 165.177, the part shall be annexed by the county board to an adjoining district. The annexed territory shall become a part of the receiving district upon receipt by the secretary or clerk of such district of notice of such annexation from the county board."

By specifying in this section that the plan of reorganization might divide existing unreorganized districts, we believe it clear that the Legislature intended that the plan could not divide reorganized districts.

After a common district has been annexed to an enlarged district under the provisions of Section 165.300, RSMo 1949, it is as much a part of the enlarged district as if it had been included as a part of the enlarged district in the original plan of reorganization. Consequently, the same principle would be applicable, and to include that portion of the enlarged district in the territory of another proposed enlarged district would be division of the reorganized district, which is not permissible.

CONCLUSION

It is the opinion of this office that a plan of reorganization proposed by the county board of education may not divide existing

Honorable Paul Boone

reorganized districts, and this is true whether the territory sought to be included in another proposed enlarged district was part of the original plan of reorganization or was added by annexation.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWl:ml
Enc.

OFFICERS:
COUNTY HIGHWAY
COMMISSION:

Indexed

For a violation of Sec. 23.100 RSMo 1949, the members of a county highway commission could be removed from office, under the procedure specified in Secs. 106.220 RSMo 1949 et seq., or by the institution of proceedings in quo warranto.



July 18, 1956

Honorable Ealum Bruffett
Representative
Ozark County
Gainesville, Missouri

Dear Mr. Bruffett:

Reference is made to your request for an official opinion of this office, which request reads in part as follows:

"The County Highway Commission of Ozark County has failed to make an annual report to the County Court as provided in Section 230.100. We request an opinion from your office as to the procedure in removing members of said commission for failure to make said report."

Section 230.100 RSMo 1949, to which you refer, provides that it shall be the duty of the county highway commission, annually, to make a complete, detailed report to the county court, and to the state highway commission, showing in detail the amount of money received and how applied. Said section further provides that if any such highway commission fails to make said report, the members thereof shall forfeit their office as such commission.

The office of county highway commissioner is a public office. State ex rel. Flowers v. Morehead, 256 Mo. 683.

Section 4, of Article VII of the Constitution of Missouri, provides:

"Removal of officers not subject to impeachment.-- Except as provided in this Constitution, all officers not subject to impeachment shall be subject to removal from office in the manner and for the causes provided by law."

While Section 230.100 makes the failure to file such report result in a forfeiture, said section or other sections relating to the county highway commission do not prescribe a method or procedure for removal of said officers. In the absence of special

Honorable Ealum Bruffett

provisions in this regard, we are of the opinion that the general provisions relating to the removal of county officers, as contained in Secs. 106.220 RSMo 1949 et seq. would be applicable. It is a fundamental rule in the construction of statutes that statutes relating to the same subject matter must be read and construed together. Further, as to the applicability of Secs. 106.220 RSMo 1949 et seq. see State ex rel. v. Morehead, noted supra.

Therefore, it is the opinion of this office that in the event of the violation of Sec. 230.100 RSMo 1949, the members of the county highway commission could be removed from office under the procedure outlined in Secs. 106.220 RSMo 1949, et seq. While we are, as stated, of the opinion that the members of a county highway commission could be proceeded against under the provisions of Secs. 106.220 et seq. for a violation of Sec. 230.100, we do not mean to state or imply that such method is exclusive.

In the case of State ex inf. McKittrick v. Wymore, 343 Mo. 98, 119 SW2d, 941, it was held that the provisions of said sections were not exclusive so as to deprive the courts of jurisdiction in quo warranto. See also State v. Mosley, 286 SW2d, 721.

CONCLUSION

Therefore, it is the opinion of this office that for a violation of Section 230.100 RSMo 1949, the members of a county highway commission could be removed from office under the procedure specified in Secs. 106.220 RSMo 1949, et seq. or by the institution of proceedings in quo warranto.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

Very truly yours,

John M. Dalton
Attorney General

DDG/ld

SCHOOLS:
PUBLIC SCHOOL
RETIREMENT SYSTEM:

Teachers of inmates of the Department
of Corrections not included.



March 26, 1956

Honorable James D. Carter
Director
Department of Corrections
Jefferson City, Missouri

Dear Colonel Carter:

Your request for an opinion from this office reads as follows:

"The Sixty-Eighth General Assembly in House Bill No. 377 requires that the Department of Corrections 'plan and institute a long-range program and courses of instruction for the education of the inmates'. We are further required to have an educational program that meets 'the standards and requirements set for other public and vocational schools of the state'.

"Teachers and officials of the public schools participate in a Retirement System. This system requires that such persons be 'duly certified under the law governing the certification of teachers'. A provision is provided under Section 169.130, Missouri Revised Statutes whereby any person 'employed full time as a teacher by the state board of training schools, or employed full time as a teacher by a division of the State Department of Public Health and Welfare and who renders services in a school whose standards of education are set and which is supervised by a public school officer of the county in which the school is located or by the State Department of Education

Honorable James D. Carter

shall be a member of the public school retirement system of Missouri'.

"The Executive Secretary of the Public School Retirement System informs us that we will not be covered by the law until such time as we have an accredited school or the law is amended to include us as done for the training schools and the Department of Public Health and Welfare. We will be unable to obtain qualified teachers unless we can offer retirement benefits. Accredited teachers are required before we can be fully accredited by the State Department of Education.

"Rules and regulations of the Missouri State Personnel Division requires that all teachers employed under the state merit system possess necessary teaching certificate from the State Department of Education. We believe that inasmuch as our teachers are duly certified by the State Department of Education that they are entitled to participation in the Public School Retirement System of Missouri."

The request refers us to the provisions of Section 169.130, respecting the certification of a person as a teacher who is employed full time as a teacher by the state board of training schools, or by a division of the state department of public health and welfare, et cetera, in relation to the public school retirement system.

Said Section 169.130, RSMo 1949, now appearing in 1955 Cumulative Supplement, pages 359, 360, reads as follows:

"Teachers at state institutions and teachers' associations as members - contributions. -

"1. Any person, duly certified under

Honorable James D. Carter

the law governing the certification of teachers, employed full time as a teacher by the state board of training schools, or by a division of the state department of public health and welfare and who renders services in a school whose standards of education are set and which is supervised by a public school officer of the county in which the school is located or by the state department of education is a member of the public school retirement system of Missouri. Any such person who becomes a member before the end of the school year next following the effective date of this section may claim and receive credit for prior service. The contributions required to be made by the member's employer shall be paid from appropriations to the institution by which the member is employed.

"2. Any person, duly certificated under the law governing the certification of teachers, employed full time by any statewide nonprofit educational association or organization serving on an educational professional basis through its membership the active members of the public school retirement system of Missouri or the public school districts maintaining high schools in this state, may be a member of the public school retirement system of Missouri. Any such person who becomes a member before July 1, 1955, may claim and receive credit for prior service. The contributions required to be made by the member's employer shall be paid by the association or organization."

Until after 1947 the laws of Missouri did not provide

Honorable James D. Carter

authority for the division of health of the department of public health and welfare or the state training schools at Booneville, Chillicothe and Tipton, all in this state, to make contributions out of their appropriations for teachers employed by such schools to make such teachers eligible as members of the retirement system to share in the public school teachers' retirement system's benefits.

Following the issuing of an opinion of this office on August 25, 1947, the Sixty-fourth General Assembly of Missouri, Laws of Missouri 1947, Volume II, page 326, amended an act of the Sixty-third General Assembly, Laws of Missouri 1945, pages 1353 to 1366, requiring that a public school retirement system of Missouri be created and administered, by adding a new section to be designated as Section 15, relating to the same subject matter, and providing that certain persons employed by the state board of training schools shall be members of the public school retirement system of Missouri. We are transmitting a copy of the said opinion dated August 25, 1947, as constituting the ground upon which the Legislature so passed such amendment.

We are also transmitting a copy of the opinion of this office dated October 31, 1949, to Honorable G. L. Donahoe, Executive Secretary, Public School Retirement System, Jefferson City, Missouri, which holds that the state librarian and other personnel of the Missouri Library Commission were not persons employed by the State Department of Education or by the State Board of Education within the definition of the words "employer" and "teacher" as those terms are defined in the law (House Bill No. 151, Laws Missouri, 1945, page 1353, as amended), setting up a public school retirement system for teachers in Missouri and were, therefore, not entitled to participate in the benefits of such law. That opinion contains the reasoning and the citation of statutes upon which, under like circumstances, this opinion is based, whereby we hold that the department of corrections is not included in the provisions of any statute in this state authorizing state institutions to employ teachers and instructors for the instruction of its inmates as are the board of training schools and the division of health of the department of public health and welfare which are specifically placed under the public school retirement system by the terms of Section 169.130, *supra*, so as to render such teachers and instructors eligible to certification as full time employed teachers so as to permit them to participate as

Honorable James D. Carter

members thereof in the benefits of the teachers' retirement system but who were held not to be under such retirement system by the said opinion of this office dated August 25, 1947.

The department of corrections cannot be held to be included in the provisions of any statute of this state authorizing state institutions to employ teachers and instructors for the instruction of its inmates, as are the board of state training schools and the division of health of the department of public health and welfare, so as to render such teachers and instructors eligible to certification as employed full time teachers so as to participate as members thereof in the public school retirement system, without and until legislation is enacted permitting them so to do.

The executive secretary of the public school retirement system in advising you, as noted in the request, that the department of corrections is not covered and will not be covered by the statutes of this state in that behalf until the statutes of this state are amended to include such department of corrections is, we believe, correct.

CONCLUSION

It is, therefore, considering the premises, the opinion of this office that the teachers employed by the department of corrections of Missouri are not eligible to membership in the public school retirement system of Missouri.

The foregoing opinion, which I hereby approve, was prepared by my assistant, George W. Crowley.

Very truly yours

John M. Dalton
Attorney General

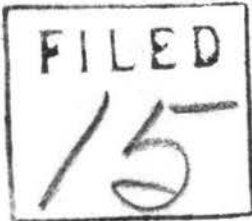
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2 enclosures

MISSOURI RURAL REHABILITATION
CORPORATION:
AGRICULTURE:
DEPARTMENT OF AGRICULTURE:

The Secretary of Agriculture of the
United States or his delegatee has
power and authority under provisions of
Sec. 261.026, RSMo Cum. Supp. 1955, and
under terms of agreement entered into

between the United States Dept. of Agriculture and the
Commissioner of Agriculture of the State of Missouri under
date of January 23, 1952, to compromise, adjust and cancel
under provisions of 7 USCA, Sec. 1015(g), State Rural Reha-
bilitation Corporation's debts and obligations to be administer-
ed by said officer under terms of 40 USCA, Sec. 40.



May 1, 1956

Honorable L. C. Carpenter
Commissioner of Agriculture
Jefferson Building
Jefferson City, Missouri

Dear Mr. Carpenter:

From information on file in this office we find that the Missouri Rural Rehabilitation Corporation was incorporated on September 5, 1934, for the purpose of facilitating the administration of a rural rehabilitation program in the State of Missouri with grants made by the Federal Government. Thereafter it became necessary by reason of a rule of the Comptroller General to administer the program as a direct federal activity and, therefore, on October 31, 1936, the Missouri Rural Rehabilitation Corporation transferred its assets to the United States in trust for the purpose of carrying on a rural rehabilitation program in the State of Missouri. According to information received from the Farmers Home Administration the Missouri corporation was dissolved on March 7, 1940.

Subsequently Congress by the "Rural Rehabilitation Corporation Trust Liquidation Act" (Public Law 499, 81st Congress) authorized return of the funds held by the Federal Government. Said Act provided that application for a return of the assets held by the Federal Government be made to the Secretary of Agriculture by the State Rural Rehabilitation Corporation or if the Corporation had been dissolved by such other agency or official of the State as designated by the State Legislature. Title 40, Sec. 440(c) USCA.

In view of the fact that Missouri Rural Rehabilitation Corporation has been dissolved the Missouri General Assembly enacted Section 261.025 RSMo Cum. Supp. 1955, authorizing the Commissioner of Agriculture to make application to and receive from the Secretary of Agriculture of the United States the trust assets held by the United States as trustee in behalf of the Missouri Rural Rehabilitation Corporation. Pursuant to

Honorable L. C. Carpenter

an appropriate application dated December 21, 1951, and a certain instrument of transfer dated January 17, 1952, the assets being administered by the Federal Government were returned to the Commissioner of Agriculture.

Title 40, Sec. 440(f) further provided that the Secretary of Agriculture of the United States could enter into agreements with any state rural rehabilitation corporation or other state agency or official to accept, administer, expend and use in the state all or any part of the assets as might be again transferred to the Secretary. Said subsection more fully provides as follows:

"The Secretary is authorized to enter into agreements with any state rural rehabilitation corporation or other State agency or official having jurisdiction of the trust assets which have been returned pursuant to application made therefor under subsection (c) of this section, and upon such terms and conditions and for such periods of time as may be mutually agreeable, to accept, administer, expend and use in such State all or any part of such trust assets or any other funds of such State rural rehabilitation corporation or State agency, which are transferred to the Secretary for carrying out the purposes of sections 1001-1005d, 1007, 1008 and 1009 of Title 7 and in accordance with the applicable provisions of sections 1014-1029 of Title 7 as now or hereafter amended. Funds appropriated for the administration of sections 1000-1025 and 1027-1029 of Title 7 shall also be available for carrying out such agreements. May 3, 1950, c. 152, Sec. 2, 64 Stat. 98."

In accordance with the terms of the foregoing section the Missouri General Assembly authorized and directed the Commissioner of Agriculture to enter into an agreement. Said authority and directive is contained in Section 261.026, RSMo Cum. Supp. 1955, as follows:

"1. The commissioner of agriculture is authorized and directed to enter into agreements with the Secretary of Agriculture of the United States pursuant to section 2(f)[40 USCA 440f] of the

Honorable L. C. Carpenter

aforesaid act of the Congress of the United States, upon such terms and conditions and for such periods of time as may be mutually agreeable, authorizing the Secretary of Agriculture of the United States to accept, administer, expend and use in the state of Missouri all of such trust assets for carrying out the purposes of Title I and II of the Bankhead-Jones Farm Tenant Act (7USCA § §1001-1007a), in accordance with the applicable provisions of Title IV thereof (7 USCA §§1030-1039), as now or hereafter amended, and to do any and all things necessary to effectuate said agreements.

"2. The United States and the Secretary of Agriculture thereof shall be held free from liability by virtue of any transfer of such assets to the commissioner of agriculture."

Pursuant to such authority the State Commissioner of Agriculture entered into an agreement dated January 23, 1952, a copy of said agreement has been submitted for our consideration.

From the correspondence attached to your request we understand the question to be whether the Secretary of Agriculture of the United States has authority in regard to liquidating the trust assets above referred to, and the authority to compromise, adjust and cancel debts and obligations as provided in Section 1015(g) of Title 7 USCA. Since there is no dispute as to the provisions of Section 1015(g) and in view of the extensiveness of said provision, it will not be set forth at length herein.

It is to be noted that Section 261.026, RSMo Cum. Supp. 1955, authorizes the Commissioner of Agriculture to enter into an agreement (pursuant to 40 USCA, Sec. 440) authorizing the Secretary of Agriculture of the United States to accept, administer, expend and use in the State of Missouri the trust assets "for carrying out the purposes of Titles I and II of the Bankhead-Jones Farm Tenant Act (7 USCA, Secs. 1001-1009,) in accordance with the applicable provisions of Title IV thereof, (7 USCA, Secs. 1014-1029) as now or hereafter amended and to do any and all things necessary to effectuate said agreements."

Section 1015(g) of Title 7, USCA, to which you refer is included in Title IV of the Bankhead-Jones Farm Tenant Act referred to in Section 261.026, supra, and we are of the opinion that the term "administer" as contained in said section is sufficiently broad to encompass the power and authority of the Secretary of Agriculture to

Honorable L. C. Carpenter

compromise, adjust and cancel debts and obligations as provided by 7 USCA, Sec. 1115(g).

Likewise, the agreement entered into contains sufficiently broad authority. Section 5 of said agreement provides, in part, as follows:

"In administering and expending such assets the Secretary of Agriculture of the United States or his delegatee shall have and may exercise in his official capacity with respect to any account receivable transferred hereunder or any indebtedness arising from loans or payments made under authority of this Agreement.

"(a) the power and authority to compromise, adjust or cancel obligations which shall be deemed to include, but not be limited to, the powers vested in the Secretary of Agriculture of the United States to compromise, adjust, or cancel obligations in accordance with the provisions of * * * and Section 41(g) of the Bankhead-Jones Farm Tenant Act, as amended (60 Stat. 1065; 7 USCA 1015(g));"

CONCLUSION

Therefore, it is the opinion of this office that the Secretary of Agriculture of the United States or his delegatee has the power and authority under the provisions of Section 261.026, RSMo Cum. Supp. 1955, and under the terms of a certain agreement entered into between the United States Department of Agriculture and the Commissioner of Agriculture of the State of Missouri, under date of January 23, 1952, to compromise, adjust and cancel, in accordance with the provisions of 7 USCA, Sec. 1015(g), State Rural Rehabilitation Corporation's debts and obligations to be administered by said officer under the terms of 40 USCA, Sec. 440.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Donal D. Guffey.

Yours very truly,

John M. Dalton
Attorney General

DDG:mw

PLACEMENT OF
CHILDREN:

Any unlicensed person who assists in placing a child
in any home or institution is in violation of the law.



May 29, 1956

Honorable Proctor N. Carter
Director of Welfare
State Department of Public
Health and Welfare
Jefferson City, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"During the past ten years there has been a great increase in the demand for children for adoption. As a result the demand has far exceeded the number of babies available. It has been estimated that there are ten requests to one placement that is made by licensed child placing agencies. A wide variety of factors have contributed to this large growth in adoptions. First in order of importance is the increasing popular acceptance in recent years of the whole concept of adoption. Also, prejudice against the child born out of wedlock, who account for more than half of the children involved in adoptions by non-relatives, has been largely dispelled. Moreover, there has been a substantial increase in illegitimate births. Another factor not to be overlooked in the growth of adoptions is the increase in the number of homes broken by death, divorce and desertion.

"The placing of a child for adoption is a serious matter, and requires the safeguards of a skilled investigation by trained personnel as adoption determines the entire future of a child since it severs his ties with his natural parents and relatives permanently and transplants him into a new family where he will remain until he is grown. There he will receive the care and treatment which will determine the kind of adult which he will become. To natural parents, adoption usually means relinquishing the child forever without the privilege of seeing him or even knowing his whereabouts. To the adoptive parents, it means undertaking the care of a child who will become a permanent member of their family and to whom they will have the

same obligations as a child born to them.

"It has been reported that in some instances doctors, lawyers, nurses and other persons not licensed under the provisions of Section 210.201, Laws of Mo. 1955, as a child placing agency, have acted as intermediaries in finding children for adoption or making placements. The intermediary often defends his practice on the grounds he is acting for the mother; that he is protecting the child, the mother, and the adoptive parents; that his activities are on a non-commercial basis; and he is a benefactor and has a humanitarian interest in helping the natural mother out of an embarrassing situation. In other instances we have been informed that the nonlicensed person was unaware that there was any legal requirements or restrictions under which child placements could be made in this State.

"Child placing agencies exist to find the best opportunities for a child; not necessarily to find children for adults. If there are ten applications from people who want to adopt a child, there certainly ought to be one family that perhaps is a little better suited to care for a child than the nine others.

"In the interest of protecting children who cannot have the benefit of a normal home with natural parents, we would appreciate receiving an opinion from you as to whether there is a violation of the law when placements are made by non-authorized persons, including doctors, lawyers and nurses, and also whether the Juvenile Court, in its discretion would be authorized to dismiss an adoption petition, when upon inquiry, it was determined that the original placement was made by a person or persons unlicensed and unauthorized by statute to participate in the placement of the child, and to make an order regarding the future custody of the child if the person having possession of the child had secured possession from or through a non-authorized person, and had not complied with the provisions of Section 453.110, R.S.Mo. 1949."

Your first question is in regard to the placement of children by unlicensed persons.

Paragraph 3 of Section 210.201, MoRS Cum. Supp. 1955, reads:

Honorable Proctor Carter

"(3) 'Child placing agency' means and includes any person who advertises or holds himself out as placing or finding homes for children or as otherwise disposing of children, or who actually places, or assists in placing, one or more children in homes of other persons or in institutions, or who causes, or assists in causing, the adoption or change in possession or custody of one or more children, for compensation or otherwise; * * *."

It will be noted that this paragraph, which defines the term "child-placing agency", gives three definitions of the term, one of which is a person "who actually places, or assists in placing, one or more children in homes of other persons or in institutions."

Section 210.211, RSMo Cum. Supp. 1955, reads in part:

"License required - exceptions.-- It shall be unlawful for any person to establish, maintain or operate a boarding home for children, a day care home or day nursery for children, or a child placing agency as defined in sections 210.201 to 210.245, or to advertise or hold himself out as being able to perform any of the services as defined in section 210.201, without having in full force and effect a written license therefor granted by the division of welfare, provided that nothing in sections 210.201 to 210.245 shall apply to: * * *"

It seems obvious that the answer to your first question, therefore, is that any unlicensed person, which of course would include a doctor, lawyer, or nurse, who assists in placing even one child in a home or institution, is in violation of this law and is subject to prosecution under Section 210.245 RSMo Cum. Supp. 1955, since such person is a "child-placing agency", within the meaning of paragraph 3 of Section 210.201, supra. In regard to this matter, we direct your attention to the case of Goodman v. District of Columbia, 50 Atl. Rep. (2d) 812. At l.c. 813, the opinion in that case reads in part:

"The Act under which appellant was prosecuted was passed early in 1944 and was the culmination of many years of struggle on the part of social agencies and others to put an end to the unregulated transfer, placing and brokerage of babies and the social evils which resulted therefrom. Until that time this was one of the very few jurisdictions in which there was no control over such activities.

"The Act is comprehensive in nature and expresses the purpose of Congress to secure for children under sixteen who are placed in family homes other than their own or those of relatives, the best care and guidance, so as to serve the welfare of such children and the best interests of the community. To accomplish that purpose Congress prohibited the operation of any child-placing agency by anyone not specifically licensed for that purpose by the Commissioners. It authorized the Board of Public Welfare to investigate applicants for licenses and if found to meet certain requirements set out in the statute, to recommend them to the Commissioners. To prevent 'careless placement of babies for adoption, without adequate consideration of the interests of the parents, the children, and the adopting parents,' Congress wrote into the Act this provision:

"'Any person, firm, corporation, association, or public agency that receives or accepts a child under sixteen years of age and places or offers to place such child for temporary or permanent care in a family home other than that of a relative within the third degree shall be deemed to be maintaining a child-placing agency.' Code 1940, § 32--782.
and followed it with this later provision:

"'No person other than the parent, guardian, or relative within the third degree, and no firm, corporation, association, or agency, other than a licensed child-placing agency, may place or arrange or assist in placing or arranging for the placement of a child under sixteen years of age in a family home or for adoption.' Code 1940, § 32--785."

At l.c. 814, the opinion reads:

"If appellant were proceeding on the assumption that he, as a lawyer, had a right to place the child for adoption, though he was unlicensed for that purpose, he was mistaken. We look in vain for any token of intention within the statute that the placing of babies by lawyers should be in any different or forgiven status than such placing by citizens in any other class. No court has said that such statutes do not apply to lawyers. No scrutiny of the sections involved can yield up such an exemption by mere process of judicial construction. If it could,

Honorable Proctor N. Carter

the courts might just as properly create a whole series of exemptions; and before long the process of erosion by judicial construction would be complete and the Act ineffective.

"We are told that if defendant is not absolved, no lawyer can feel safe when he is called on to advise or act in an adoption case. Even if that were so we could not help it; we would have to apply the statute as it is written. But we think the careful lawyer will have little trouble in determining what he may lawfully do in such situations. We think even a cursory reading of the statute will tell him how far he may go and where he must stop."

In regard to your second question, we believe that the juvenile court has complete authority in the matter and may grant or deny an adoption petition upon whatever ground it sees fit, and that it is not answerable as to the ground it chooses, or the weight it may give to any particular fact or factor in the situation.

We wish to state that we are not passing upon the constitutionality of the law here involved, but are assuming its constitutionality.

CONCLUSION

It is the opinion of this department that any unlicensed person who assists in placing a child in any home or institution is in violation of the law; and that a juvenile court has complete discretion in rejecting an adoption petition.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW/ld

DEPARTMENT OF AGRICULTURE:
APPROPRIATIONS:



Salary of State Commissioner of Agriculture may be paid from funds made available by Section 4.710 of House Bill No. 4, and Section 13.740 of House Bill 558, as enacted by the 68th General Assembly. The salary of the State Commissioner of Agriculture may also be paid from funds appropriated by Section 4.765 of House Bill No. 4, adopted by the 68th General Assembly if such payment is authorized by appropriate Federal authority

June 8, 1956

Honorable L. C. Carpenter
Commissioner of Agriculture
Jefferson City, Missouri

Dear Mr. Carpenter:

Reference is made to your recent request for an official opinion of this office wherein you inquire whether the salary of the Commissioner of Agriculture can be paid from the various funds available to the Department or only from the funds appropriated by Section 4.710 of House Bill No. 4 enacted by the 68th General Assembly.

Section 4.710 of House Bill No. 4, to which you refer, provides, in part, as follows:

"There is hereby appropriated out of the State Treasury, chargeable to the Agricultural Fees Fund, the sum of Four Hundred Twenty-two Thousand Six Hundred Forty Dollars (\$422,640.00) for the use of the director of the Department of Agriculture for the payment of salaries wages and per diem of the commissioner, officers and employees; for the original purchase of property; for the repair and replacement of property and for operating expenses; for the period beginning July 1, 1955 and ending June 30, 1957, as follows:

"Personal Service:

"For the payment of salaries, wages and per diem of the Commissioner, Assistant Commissioner, chief clerk, secretary, bookkeeper, chief chemist, assistant chemist, stenographers, clerks, district inspectors, mailing clerk, janitor, federally licensed fruit and vegetable inspectors, locker plant inspectors, shipping inspectors, and other necessary employees. . . \$252,320.00."

Honorable L. C. Carpenter

You state that the Department of Agriculture is operated through some nineteen separate funds not including the State Fair and Grain Warehouse Funds. We have carefully examined Sections 4.710 to 4.890 of House Bill No. 4, and Section 13.750 of House Bill 558 and do not find any appropriation other than Section 4.710, which specifically indicates that the appropriation is to be used for payment of the salary and per diem of the Commissioner of Agriculture. Your attention is invited to Section 23 of Article IV of the Constitution, which provides, as follows:

"The fiscal year of the state and all its agencies shall be the twelve months beginning on the first day of July in each year. The general assembly shall make appropriations for one or two fiscal years, and the 63rd General Assembly shall also make appropriations for the six months ending June 30, 1945. Every appropriation law shall distinctly specify the amount and purpose of the appropriation without reference to any other law to fix the amount or purpose."

Section 21.260, RSMo 1949, adopted in conformity with Section 23 of Article IV of the Constitution, provides as follows:

"Appropriations for the operation and maintenance of departments shall be separately itemized; and separate appropriations shall be made for each item of extraordinary operation and maintenance expenditure and for each major capital expenditure. Every appropriation law shall distinctly specify the amount and purpose of the appropriation without reference to any other law to fix the amount or purpose."

The foregoing constitutional and statutory provisions require every appropriation law to distinctly specify the amount and purpose of the appropriation and further provide that no money shall be withdrawn from the state treasury unless the state auditor certifies that the expenditure is within the purpose of the appropriation. It is apparent that Section 4.710 of House Bill No. 4 was adopted in conformity with the requirement that an appropriation distinctly specifies the purpose of the appropriation which particular appropriation included the salary and per diem of the Commissioner of Agriculture.

In view of the fact previously noted that none of the other appropriations to the Department of Agriculture distinctly specify that they are to be used to pay the salary of the Commissioner of

Honorable L. C. Carpenter

Agriculture whereas Section 4.710 does distinctly specify that said appropriation is to be used for that purpose, we are led to the conclusion that the Legislature considered the payment of the Commissioner of Agriculture's salary and intended that it be paid only out of the funds appropriated by Section 4.710 of House Bill No. 4.

We cannot assume that Section 4.710 was not intended to be complete for the purposes specified, absent a distinct specification in companion appropriations.

We wish to note and consider specifically Section 4.765 of House Bill No. 4 adopted by the 68th General Assembly. Said section provides as follows:

"Federal funds from the federal government made pursuant to Public Law 733 or any other Federal Act incident thereto for carrying out a marketing program on agriculture and other products produced by the State of Missouri. There is hereby appropriated the sum of One Hundred Thousand Dollars (\$100,000.00) in all allotments, grants, and contributions of funds which may be received by this State from the federal government for the period beginning July 1, 1955, and ending June 30, 1957, which are made pursuant to Public Law 733 or any other Federal Act incident thereto for carrying out a marketing program on agriculture and other products produced by the State of Missouri, for the purpose of paying any federal grants or allotments received by the State of Missouri for such purpose, and are hereby appropriated for the use of the State Department of Agriculture."

This section is not an appropriation of state revenues in the ordinary sense but is an appropriation of allotments, grants and contributions of funds which may be received by the state from the Federal Government for the period July 1, 1955, to June 30, 1957. The purpose of such grants and contributions made by the Federal Government is to aid in carrying out a marketing program contemplated by Public Law 733 (Title 7 USCA, Sec. 1621 et seq.). We have examined Public Law 733 and do not find anything which would preclude the use of said funds to compensate a state officer engaged in cooperative work and therefore we are of the opinion that said fund may be used for that purpose if authority therefor is granted by the appropriate agency of the Federal Government.

Honorable L. C. Carpenter

We wish also to note specifically Section 13.740 of House Bill 558, adopted by the 68th General Assembly. Said section provides as follows:

"There is hereby appropriated out of the State Treasury chargeable to the Agricultural Fees Fund, for the use of the Commissioner of the Department of Agriculture, complying with the provisions of House Bills 177, 257 and 101, Acts of the 68th General Assembly, for the period beginning July 1, 1955, and ending June 30, 1957, as follows:

"Personal Service\$100,000.00
Additions, Repairs and Replacements. . .	800.00
Operation.	<u>74,200.00</u>
Total.\$175,000.00

"The foregoing amounts are in addition to the amounts appropriated for the same purposes as set out in Section 4.710 of House Bill 4, an act of the 68th General Assembly."

Said section provides that the amounts specified are in addition to the amounts appropriated for the same purposes as set out in Section 4.710 of House Bill No. 4 which, of course, provides for the salary of the Commissioner of Agriculture.

CONCLUSION

Therefore, it is the opinion of this office that the salary of the State Commissioner of Agriculture may be paid from funds made available by Section 4.710 of House Bill No. 4 and Section 13.740 of House Bill 558 as enacted by the 68th General Assembly.

We are further of the opinion that the salary of the State Commissioner of Agriculture may likewise be paid from funds appropriated by Section 4.765 of House Bill No. 4, adopted by the 68th General Assembly, if such payment is authorized by appropriate Federal authority.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Donal D. Guffey.

Yours very truly,

John M. Dalton
Attorney General

COUNTY WELFARE OFFICE: When county court appoints county welfare director as its agent to disburse county pauper fund
COUNTY COURTS: under court's directions, fund does not lose identity, and does not become money contribution for support and maintenance of county welfare office within the meaning of Section 207.060, RSMo 1949. Fund shall be paid to county welfare director and not to state collector of revenue. Contributions of services or quarters for support and maintenance of county welfare office are not money contributions within meaning of Section 207.060, RSMo 1949, and shall not be paid to state collector of revenue. County Court authorized to pay same directly to persons performing services or furnishing quarters for county welfare office.

June 14, 1956

Honorable Proctor N. Carter
Director, Division of Welfare
Jefferson City, Missouri



Dear Mr. Carter:

This department is in receipt of your recent request for our official opinion, which reads in part as follows:

"It has been called to my attention that in an opinion rendered by your office under date of April 5, 1956, it was ruled that the county courts were authorized to contribute to the support and maintenance of county welfare offices, and that funds contributed should be paid to the State Collector of Revenue and not to the personnel of the county welfare office. This opinion has been interpreted by several county courts as requiring that all funds made available by the county court for the support and maintenance of the welfare office, as well as expenditures made by the welfare office in the distribution of the county pauper fund, be paid to the Collector of Revenue.

* * * * *

"Inasmuch as the opinion of April 5, 1956, has been interpreted by some counties as meaning that all contributions made by the county court should be paid to the State Collector of Revenue, we would appreciate receiving an opinion from you as to whether funds expended by the county welfare director as an agent of the county court for the care of sick and indigent persons have to be paid to the State Collector of Revenue, and whether contributions for services and quarters made by the county court

Honorable Proctor N. Carter

for the benefit of the county welfare office can be paid for by the county clerk, or do these funds have to be paid to the State Collector of Revenue."

From said inquiry two questions have been propounded which are: (1) Whether funds expended by the county welfare director, as agent of the county court for the care of sick and indigent persons, have to be paid to the state collector of revenue. (2) Whether or not contributions for services and quarters made by the county court for the benefit of the county welfare office can be paid directly to the persons furnishing said services or quarters, or do these funds have to be paid to the ~~state~~ collector of revenue.

In our opinion rendered to Honorable Samuel E. Semple, Prosecuting Attorney of Randolph County, on November 19, 1952, it was held that a county court may appoint the county welfare director as its agent in carrying out the ministerial functions relating to distribution of the pauper fund, under direction of the county court. On page 3 of said opinion the question mentioned above was discussed more in detail as follows:

"While under the above rule the duty of providing for the poor of the county is imposed upon the county court, still the carrying out of the ministerial functions of such duty may be delegated to an agent of the county court. Therefore, if the county court desires to designate a county welfare director as its agent in carrying out such functions, then such delegation is proper and legal. The moneys so spent at no time become state moneys, but remain county moneys to be spent under the supervision of the county court by the county welfare director."

You call attention to our opinion of April 5, 1956, and state that said opinion has been interpreted by some county courts as meaning that all contributions of the county court to the county welfare office must be paid to the state collector of revenue.

Our attention is also called to an opinion of October 4, 1938, to the state social security commission. Among other things said opinion holds that the county is authorized to furnish persons to serve in the state social security commission county office and to pay compensation directly to such persons, in the amount

Honorable Proctor N. Carter

agreed upon between the county and such individuals. The effect of our holding in the opinion of April 5, 1956, is that under the provisions of Section 207.060, RSMo 1949, if the county court contributes county funds for the support and maintenance of the county welfare office, such funds shall be paid to the state collector of revenue and not to personnel of the county welfare office. No statements or inferences were made in said opinion that all contributions, i.e., those of every kind or class made by the county court for the benefit of the county welfare office, could be made only to the state collector of revenue. If such a construction has been reached, it is incorrect. The opinion dealt only with money contributions made for the purpose mentioned, and had no reference to any funds involved in the former opinions of this office mentioned above, and that we believe said opinion is fully in accord with the earlier ones.

It is believed that in view of the holding of our opinion of November 19, 1952, that when the county court appoints the county welfare director as its agent, and then pays the pauper funds to such agent to distribute among the indigent of the county, as directed by the county court, said funds are to be used only for the purposes stated and cannot be legally used for any other purpose. Funds thus paid are not for the purpose of supporting and maintaining the local welfare office and are not required to be paid to the state collector of revenue, hence, our opinion of April 5, 1956, is in accord with that of November 19, 1952, and fully answers your first inquiry. A copy of said opinion is herewith enclosed.

The second inquiry is whether or not contributions for services and quarters made by the county court for the benefit of the county welfare office can be made directly to the persons furnishing the services or quarters, or do these funds have to be paid to the state director of revenue. In this connection, we call attention to subsection 2 of Section 207.060, RSMo 1949, which reads as follows:

"For the purpose of establishing and maintaining county offices, or carrying out any of the duties of the division of welfare, the director of welfare may enter into agreements with any political subdivision of this state, and as a part of such agreement, may accept moneys, services, or quarters as a contribution toward the support and maintenance of such county offices. Any funds so received

Honorable Proctor N. Carter

shall be payable to the state collector of revenue and deposited in the proper special account in the state treasury, and become and be a part of state funds appropriated for the use of the division of welfare."

From this section it is noted that three distinct kinds or classes of contributions for support and maintenance of the county welfare office may be made by the county court, which are, moneys, services, and quarters. From the context in which they are used, it appears that these terms are not synonymous in meaning, or that one class of contributions could be substituted for another. As evidence of the legislative intent in this respect, for some reason best known to the law-makers, they have expressly stated in the section that all money contributions for the benefit of the county welfare office shall be made to the state collector of revenue. No such provisions have been made with reference to the other classes of contributions, and they are not required to be made to the state collector of revenue.

It is further noted that Section 207.060, supra, does not prohibit the county court from making contributions of services or office space to the county welfare office. It is believed that the court would be authorized to give its permission for county employees to perform services in the county welfare office, or the court might furnish office space, rent free, in the courthouse or any other county building, to the welfare office. In the alternative, the county court would be authorized to furnish county funds with which to pay the compensation of persons serving in the county welfare office, and to pay such compensation directly to those individuals performing the services. Such was the conclusion reached in our opinion to the state social security commission, previously referred to herein, and a copy of same is enclosed. For the same reasons given in the last-mentioned opinion, it is further believed that instead of furnishing office space to the welfare office, the county court is authorized to expend any available county funds for the rent of suitable quarters for the welfare office, and to pay said funds to the owner, or other person furnishing said quarters.

In the event the county court spends money for services or quarters, such contributions do not lose their identity as contributions for services or quarters, and do not become fund contributions within the meaning of Section 207.060, supra.

Honorable Proctor N. Carter

However, we desire to point out that while such funds can properly be paid directly to those furnishing the services or quarters, said funds cannot be paid to personnel of the county welfare office, and such personnel are unauthorized to spend same for services or quarters, as it is obvious such a procedure would violate the legislative intent and purpose as expressed in the statute.

In view of the foregoing, it is our thought that contributions for services or quarters for the support and maintenance of the county welfare office, under provisions of Section 207.060, RSMo 1949, are not money contributions, and are not required to be made to the state collector of revenue. Any county funds expended by the county court for such purposes may be paid directly to the persons performing the services, or to those furnishing quarters for the county welfare office.

CONCLUSION

It is, therefore, the opinion of this department that when the county court appoints the county welfare director as its agent, to disburse the county pauper fund under direction of the county court, said fund does not lose its identity and does not become a money contribution for the support and maintenance of the county welfare office, within the meaning of Section 207.060, RSMo 1949. Said fund shall be paid to the county welfare director and not to the state collector of revenue.

It is further the opinion of this department that contributions of services or quarters for the support and maintenance of the county welfare office are not money contributions within the meaning of Section 207.060, RSMo 1949, and shall not be paid to the state collector of revenue. In making all such contributions, the county court is authorized to pay same directly to the persons performing the services or to those furnishing quarters for the county welfare office.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Very truly yours,

John M. Dalton
Attorney General

PNC:ld:gm

Enclosures:

Opinions

11/19/52 to Samuel E. Semple
10/4/38 to State Soc. Sec. Comm.

AGRICULTURE:
EGGS:



Drivers of trucks making deliveries for a business duly licensed as a "retailer" under provisions of Chapter 196, Sec. 310 et seq., which drivers also solicit orders and sell eggs en route, are not required to obtain a retailer's license.

June 21, 1956

Honorable L. C. Carpenter
Commissioner of Agriculture
State of Missouri
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office, which request reads as follows:

"A problem has arisen in this Department with reference to a question involving the new Missouri Egg Law at Chapter 196 of the Revised Statutes of Missouri, 1949.

"We have a situation where a particular dairy which we shall refer to as the Country Club Dairy Company, 5633 Troost Avenue, Kansas City 10, Missouri is licensed as a retailer under the Egg Law. The Country Club Dairy Company engages in the sale of dairy products and of eggs at retail. The Country Club Dairy Company will have dairy products and eggs available for sale at retail at the plant. However, the majority of the Country Club Dairy Company sales are made on truck routes. The truck routes are manned by drivers who are paid a salary but as a whole are paid for the sale of eggs on a commission basis, based upon the number of dozen of eggs sold by the driver. In some cases the orders for eggs are called into the plant or marked on an order card in the consumer's possession which is marked before delivery. In many cases the majority of egg sales made by drivers are made as a result of direct solicitation by the driver, while in other cases the minority of the sales made are made by solicitation.

"Some question has arisen as to whether or not these trucks become a separate place of business as defined

in Section 196.335 and, therefore, each driver should have a separate retailer's license under the Law."

Section 196.313 RSMo Cum. Supp. 1955, provides in part as follows:

"No person shall buy, sell, trade or traffic in eggs in this state without a license with the following exceptions:".

Section 196.316 RSMo Cum. Supp., 1955, provides in part as follows:

"All persons engaged in buying, selling, trading or trafficking in, or processing eggs, except those listed in section 196.313, shall be required to be licensed under sections 196.311 to 196.361. Such persons shall file an annual application for such license on forms to be prescribed by the commissioner, and shall obtain an annual license for each separate place of business from the commissioner. The following types of licenses shall be issued:".

The words "buy", "trade", and "traffic" are not definite in the act. However the word "sell" is defined as follows: Section 196.311, paragraph (3) reads:

"(3) 'Sell' means offer for sale, expose for sale, have in possession for sale, exchange, barter, or trade;".

The words "traffic" and "trade" have often been held to be synonymous with buying and selling. May v. Sloan, 101 U.S. 231; State v. Deckebach, 113 Ohio State, 347; State v. Miller, 318 Mo. 581; Fine v. Moran, 74 Fla. 417; The Robin Goodfellow, 20 Fed.(2) 924, and a general reading of the whole act leads us to the conclusion that such terms were employed with the above-cited definition of the term "sell" in mind.

Under the facts that you have outlined, the drivers of the trucks are merely agents or employees of the dairy company and, while they do in a broad sense offer (in certain instances) eggs for sale, accept eggs for sale, or have in their actual possession eggs for sale, they are in each instance acting on behalf of their principal, and not on their own behalf.

Honorable L. C. Carpenter

CONCLUSION

Therefore, it is the opinion of this office that drivers of trucks making deliveries for a business duly licensed as a "retailer" under provisions of Chapter 196, Section 310 et seq., which drivers also solicit orders and sell eggs en route, are not required to obtain a retailer's license.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Donal D. Guffey.

Very truly yours,

John M. Dalton
Attorney General

DDG/ld

MISSOURI RURAL REHABILITATION
CORPORATION:
AGRICULTURE:
DEPARTMENT OF AGRICULTURE:

The Secretary of Agriculture or his
delegatee does not have the power and
authority to cancel State Rural Re-
habilitation Corporation debts and
obligations under the provisions of
Public Law 518 (12 USCA § 1150 et seq.).



August 13, 1956

Honorable L. C. Carpenter
Commissioner of Agriculture
Jefferson Building
Jefferson City, Missouri

Dear Mr. Carpenter:

Under date of May 1, 1956, this office forwarded to you an official opinion holding that the Secretary of Agriculture of the United States or his delegatee has the power and authority under the provisions of Sec. 261.026 RSMo Cum. Supp. 1955, and by the terms of an agreement entered into between the United States Department of Agriculture and the Commissioner of Agriculture of the State of Missouri to compromise, adjust, and cancel State Rural Rehabilitation Corporation debts under the provisions of 7 USCA, § 1015(g). You now inquire whether the Secretary of Agriculture has the power and authority to cancel said debts in accordance with the provisions of Public Law 518 (12 USCA, § 1150 et seq.).

As pointed out in the previous opinion, the General Assembly of the State of Missouri authorized and directed the State Commissioner of Agriculture to enter into an agreement with the Secretary of Agriculture of the United States, authorizing the Secretary to accept, administer, expend, and use in the State of Missouri all of the trust assets of the Missouri Rural Rehabilitation Corporation. Such authority is contained in Sec. 261.026 RSMo Cum. Supp. 1955, which section provides as follows:

"1. The commissioner of agriculture is authorized and directed to enter into agreements with the Secretary of Agriculture of the United States pursuant to section 2(f) [40 USCA 440f] of the aforesaid act of Congress of the United States, upon such terms and conditions and for such periods of time as may be mutually agreeable, authorizing the Secretary of Agriculture of the United States to accept, administer, expend and

use in the state of Missouri all of such trust assets for carrying out the purposes of Titles I and II of the Bankhead-Jones Farm Tenant Act [7 USCA §§ 1001-1007a], in accordance with the applicable provisions of Title IV thereof [7 USCA §§ 1030-1039], as now or hereafter amended, and to do any and all things necessary to effectuate said agreements."

It is to be noted from the foregoing section that the funds are to be accepted, administered, expended and used for carrying out the purposes of Title I and II of the Bankhead-Jones Farm Tenant Act "in accordance with the applicable provisions of Title IV thereof [7 USCA §§ 1030-1039], as now or hereafter amended."

While Public Law 518 (Title 12 USCA §1150 et seq.) does authorize the Secretary of Agriculture to cancel indebtedness arising under the Bankhead-Jones Farm Tenant Act, and while the agreement entered into between the Commissioner of Agriculture of Missouri and the Secretary of Agriculture does purport to convey such cancellation authority on the secretary, (Sec. 5(a) of the Agreement reads thus:

"the power and authority to compromise, adjust or cancel obligations which shall be deemed to include, but not be limited to, the powers vested in the Secretary of Agriculture of the United States to compromise, adjust, or cancel obligations in accordance with the provisions of the Act of December 20, 1944 (58 Stat. 836; 12 U.S.C. 1150), and Section 41(g) of the Bankhead-Jones Farm Tenant Act, as amended (60 Stat. 1065; 7 U.S.C. 1015(g));",.

said law does not constitute a part of Title IV of the Bankhead-Jones Farm Tenant Act. Under such circumstances we are of the opinion that the authority of the Commissioner of Agriculture to cancel indebtedness arising as a result of administration of Missouri Rural Rehabilitation Corporation trust funds is limited to the authority granted by a valid agreement entered into under the provisions of Sec. 261.026 RSMo Cum. Supp. 1955, and that the attempt to convey the cancellation authority contained in Public Law 518 upon the Secretary of Agriculture is a nullity, since the State Commissioner of Agriculture had no such authority under the provisions of Sec. 261.026.

CONCLUSION

Therefore, it is the opinion of this office that the Secretary of Agriculture or his delegatee does not have the power and authority to cancel State Rural Rehabilitation Corporation debts

Honorable L. C. Carpenter

and obligations under the provisions of Public Law 518 (12 USCA § 1150 et seq.).

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

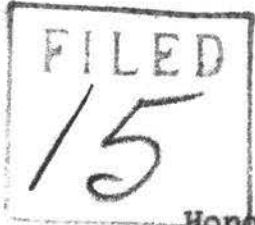
Very truly yours,

John M. Dalton
Attorney General

DDG/ld

WAREHOUSES:
PUBLIC WAREHOUSES:
DEPARTMENT OF
AGRICULTURE:

The provisions of Section 411.260 RSMo 1949, relating to the licensing of public warehouses is optional with "local public warehouses", and such licensing is not mandatory.



August 27, 1956

Honorable L. C. Carpenter
Commissioner of Agriculture
Jefferson City, Missouri

Dear Mr. Carpenter:

Reference is made to your request for an official opinion of this office, which request reads as follows:

"A problem has arisen within the Department relating to the new provisions of Chapter 411 of the Revised Statutes of Missouri, 1949, as was enacted by the last Legislature and with relation to the old provisions of that Chapter.

"Old Section 411.260, which was the section providing for the licensing of all commercial mills and grain elevators, provided in the last sentence at subparagraph 3, 'The provisions of this section shall be optional with local public warehouses as defined in Section 411.250.'

"My question is whether or not, since 411.250 has been repealed, the option provision cited above is of no effect or whether it still stands and, of course, finding whether public warehouses and local public warehouses, as well as terminal public warehouses, are now required to meet the licensing provisions of 411.260."

Section 411.260 RSMo 1949, to which you refer, provides as follows:

"1. Any persons, firm, corporation, or association save as here'in provided desiring to engage in business as a public warehouseman in this state shall, before the transaction of any such business, present to the commissioner, on a form designated by him, a written application for a license for each separate warehouse, or designated part thereof, at which he desires to do such business, setting forth

"(1) The exact description and location thereof;

Honorable L. C. Carpenter

"(2) The individual name and address of each person interested as principal in the business;

"(3) In case the business is operated or to be operated by a corporation the names of the president and secretary;

"(4) A complete certified financial statement of recent date on a blank furnished by the commissioner;

"(5) And such further information as the commissioner may require;

"(6) And the operator shall designate whether a local public warehouse license or a terminal public warehouse license is applied for.

"2. Every such application shall be accompanied by a license fee to be fixed by the commissioner, but not in excess of five dollars.

"3. The license herein provided for may be granted by the commissioner at his discretion. The provisions of this section shall be optional with local public warehouses as defined in section 411.250."

Said section does, as you indicate, provide that the licensing provisions shall be optional with local public warehouses, as defined in Sec. 411.250 RSMo 1949. Section 411.250, referred to, was repealed by the 68th General Assembly, as were Sections 411.230 and 411.240 RSMo 1949. Section 411.230 defined public and private warehouses and Section 411.240 defined terminal public warehouses. In lieu of these definition sections, the 68th General Assembly enacted Section 411.025, which section defines certain terms contained in Chapter 411, including definitions of "public warehouses", "private warehouses", "terminal public warehouses," and "local public warehouses". These definitions are specifically made applicable to the provisions of Section 411.260 by the following language:

"The following words, terms and phrases, when used in sections 411.010 to 411.570, have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:".

A local public warehouse is defined as follows:

"(7) 'Local public warehouse' means any public warehouse which is not a terminal public warehouse as defined in subdivision (6) of this section."

Honorable L. C Carpenter

This definition is practically identical with the definition contained in Section 411.250 RSMo 1949, which Section provided as follows:

"The term 'local public warehouse' as used in sections 411.010 to 411.570 shall mean any public warehouse which is not a terminal public warehouse as defined in section 411.240."

In view of the foregoing, it is our opinion that the reference to "local public warehouses" in Section 411.260 is not rendered meaningless by a repeal of Section 411.250, since the definition therein contained is now incorporated in Section 411.025, which section is specifically made applicable to the provisions of Section 411.260, and that the legislative intention to make the provisions of Section 411.260 optional with local public warehouses is sufficiently manifested and preserved.

CONCLUSION

Therefore, it is the opinion of this office that the provisions of Section 411.260 RSMo 1949, relating to the licensing of public warehouses, is optional with "local public warehouses" and such licensing is not mandatory.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

Very truly yours,

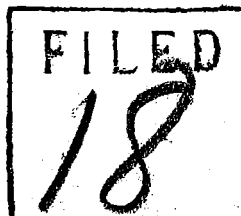
John M. Dalton
Attorney General

DDG/ld

TOWNSHIP ORGANIZATION:)
BOARD MEMBER PERFORMING LABOR)
ON DISTRICT'S ROADS CANNOT BE)
CRIMINALLY PROSECUTED:)
WHEN:)
When a township board member is employed by board to maintain a district's roads; accepts employment, maintains roads, and is paid from road district's funds; absent facts showing violation of Sections 231.150 to 231.330 RSMo 1949; board member cannot be criminally prosecuted under provisions of Sections 231.320 and 231.330 RSMo 1949.

March 1, 1956

Honorable J. W. Colley
Prosecuting Attorney
Dade County
Greenfield, Missouri



Dear Mr. Colley:

This department is in receipt of your recent request for a legal opinion and reads as follows:

"Dade County operates under township organization. The Township Board has complied with section 231.160, except they have not appointed a road overseer.

"Instead of having the road overseer, one of the members of the Township Board maintains the roads of the district and receives pay for same out of funds of road district. No attempt has been made to comply with section 231.240 other than, it appears that the member of the Township Board does the work of maintaining the roads of the district and receives pay for said work.

"Under Section 231.200 the road overseer could not employ any member of the Township Board to do road work.

"My inquiry to your office is whether or not it is legal for a member of the Township Board to perform acts as above described, and whether or not such action constitutes criminal action that is governed under Section 231.320 and Section 231.330 of Missouri Revised Statutes..

"I will appreciate your help on the above inquiry."

The second inquiry is not clear, but seems to inquire if the member of the township board who maintains the roads of a

Honorable J. W. Colley

district of the township and receives pay for his labor from the district's funds, is guilty of any action for which he might be criminally prosecuted under the provisions of Sections 231.320 and 231.330 RSMo 1949.

You state that the township board has complied with Section 231.160 RSMo 1949 except that they have not appointed a road overseer. Said section reads as follows:

"The township board of directors shall form the township into one or more road districts. If the boundary line of any road district is along a public road, then one of the other edge of said road, and not the center line, shall be the boundary line of such road; and in the event the township boards of adjoining townships are unable to agree upon the boundary lines of roads that are on the boundary lines of townships then the county court or county courts of the particular county, or counties, interested shall settle boundary lines along such township lines. In the month of April each year the board shall appoint a road overseer for each district, who shall serve for one year and until his successor is appointed and qualified. Any road overseer may be removed from office by the township board for incompetency, neglect or other good cause, and a successor may be appointed by them in his stead."

Sections 231.150 to 231.330 RSMo 1949, are in regard to township organization and road overseers. Section 231.320 provides that the prosecuting attorney of the county or his assistant shall prosecute all actions arising under the provisions of above mentioned sections. Section 231.330 is in regard to the violation of said sections and the penalty that may be assessed. Section 231.330 reads as follows:

"Any official or other person who shall willfully fail to comply with any of the provisions of sections 231.150 to 231.330 and any person who shall willfully violate any of the provisions thereof, shall be deemed guilty of a misdemeanor, and where no other or different punishment is provided, shall be punished by a fine of not less than five dollars nor more than five hundred dollars."

Honorable J. W. Colley

You make the statement that a road overseer is prohibited from employing any member of the township board to perform labor on the roads, under provisions of Section 231.200. We agree with the statement, but since there is no evidence, that the township board member referred to in the inquiry was ever appointed, served as road overseer, or that he ever employed any of his fellow members of the township board to work on the roads of his district, no further consideration will be given to the section, which is inapplicable to the statement of facts.

It might be contended that because the provisions of section 231.330, supra, declare it to be a criminal offense for any official or other person failing to comply with any of the provisions of Sections 231.150 to 231.330, the employment of one of its members to maintain the roads of a district, by a township board, the acceptance of such employment by the board member, and payment to him of compensation from the district's funds, would be a criminal offense for which the parties might be prosecuted under the provisions of Section 231.330, supra.

We cannot agree with such a contention for the reason that Sections 231.150 to 231.330 do not provide that the employment of one of its members to perform labor on a road of the district of a township by the township board, or the acceptance of such employment and payment for labor thus performed by said member, from a road district's funds shall constitute a criminal offense or offenses.

In this connection we direct your attention to the case of Polk Township v. Spencer, 364 Mo. 97, which is a case involving facts similar to those referred to in your inquiry.

Said case was an action to recover a sum of money from the defendant Spencer, paid him as compensation for labor on the roads of a district of the township during the time he was a member of the township board. While the court held that the contract between the board and one of its members was not expressly prohibited by any statute, such a transaction was against public policy, and the contract was voidable and not void. At. l. c. 102 the court said:

"In addition, while Spencer's employment was against public policy, there is no express statutory prohibition against the township board's contracting with its own members to perform work and labor upon the roads. It does not appear upon this record whether they were complied with but other statutes

Honorable J. W. Colley

contemplate the appointment of a road overseer. (V.A.M.S., Secs. 231.160-231.170, 231.210) who is expressly prohibited from employing board members to work on township roads. V. A. M. S. Sec. 231.200. Spencer was employed by the board, not a road overseer, and the board is expressly authorized to contract and to employ operators 'and necessary help and do such work by day labor.' V. A. M. S. Sec. 229.040. In Nodaway County v. Kidder, supra, in addition to the county judge's contract being against public policy, the statutes under which he held office expressly provided that 'No judge of any county court in the state, shall, directly or indirectly, become a party to any contract to which such county is a party, or to act as any road or bridge commissioner, * * *.' V. A. M. S., Sec. 49.140. Githens v. Butler County, 350 Mo. 295, 165 S.W. (2) 650. Likewise in 1899, the statutes relating to drainage districts provided that 'said commissioners shall not during their term of office, be interested, directly or indirectly, in any contract for the construction of any ditch, * * * nor in the wages or supplies, to men or teams employed in any work in said district.' Consequently, it was held that a contract by which one of the commissioners was employed as the engineer to supervise the construction of a levee and drainage ditch was void, and that he could not recover upon the warrants issued in payment of his contracted services. Seaman v. Cap-Au-Gris Levee Dist., supra, annotation 140 A.L.R. 583. The force and significance of the absence of the statutory prohibition and the presence of the authority to contract in general is that the employment contract is not void, but voidable. 'But a director is disabled from making a binding contract with the school district, not because the thing contracted for is itself illegal or tainted with moral turpitude, but because his personal relation to the district as its agent requires that he should have no self-interest antagonistic to that of the district in making a contract for it. The contract however

Honorable J. W. Colley

in such case is not absolutely void, but it is simply not a binding agreement and may be avoided." Smith v. Dandridge, 98 Ark. 38, 41, 135 S. W. 800, 34 L. R. A. (N.S.) 129; Ann. Cas. 1912D, p. 1130."

Bearing in mind the principles of law discussed in that portion of the opinion from Pelk Township v. Spencer, quoted above, and applying said principles to the facts in the instant case, it is obvious that if an information were drawn following the language of Section 231.330, supra, charging the township board members with unlawfully violating the provisions of that section (or some other section under which the information were to be drawn) by employing one of their members to maintain the roads of a district of the township, or if the member accepting such employment were charged with unlawfully accepting the employment, and receiving the funds of the district for his labor, at the time he was a member of the board, in violation of Section 231.330 (or some other section under which the information were to be drawn), in either instance the information would be insufficient and charge no criminal offense for the reason that specific facts would not be alleged showing in what particular, the section had been violated, and for the further reason that the employment of one of its members to maintain the roads of a district of the township, by the township board, the acceptance of such employment, and payment, for the labor thus performed from the district's funds, have not been declared criminal offenses by any Missouri statutes.

In this connection we call attention to the case of State v. Reynolds, 274 S. W. 2d 514, which is in point with our above mentioned contention that no crime has been committed either by the township board or one of its members who is performing labor on the roads of a district of the township. In this case the defendant was charged by information with violating Section 304.010 RSMo 1949, a statute drawn in very general terms and reading as follows:

"Every person operating a motor vehicle on the highways of this state shall drive the same in a careful and prudent manner, and shall exercise the highest degree of care, and at a rate of speed so as not to endanger the property of another or the life or limb of any person. * * *."

Honorable J. W. Colley

Section 304.570 RSMo 1949 provides a penalty for violations of above quoted section and reads as follows:

"Any person who violates any of the provisions of this chapter for which no specific punishment is provided, upon conviction thereof, shall be punished by a fine of not less than five dollars nor more than five hundred dollars or by imprisonment in the county jail for a term not exceeding two years, or by both such fine and imprisonment."

In commenting upon the insufficiency of the information the court said at l. c. 516:

"In the light of this holding the information in the case at bar fails to state a charge. It merely states that defendant 'unlawfully operated his automobile in a careless, reckless and imprudent manner so as to endanger the life, limb and property of others' contrary to the form of the statute. This allegation fails to state in what manner or way defendant violated the rules of the road as provided in the chapter of the statute under which this action was brought. It, in no way, informs defendant of the charge he is to defend against. It does not contain a plain, concise and definite written statement of the essential facts constituting the offense charged as required by Supreme Court Rule No. 24.

"We do not agree with the State that merely stating the driver unlawfully operated his car in a careless and imprudent manner is good because it follows the wording of the statute. We have set out the rule followed by the courts in this state that it is sufficient to frame an information in the words of the statute where the statute describes the entire offense by setting out the facts constituting it. Certainly, the words used by the State in the information before us do

Honorable J. W. Colley

not describe the offense charged as was held in State v. Ball, supra, cited by the State. If the information had said that defendant operated his car in a careless and imprudent manner in that he was driving at a high rate of speed or was operating it on the wrong side of the road or that he was failing to keep it as near the right-hand side of the road as practicable or any of the other requirements of the statute, and by so doing, he endangered the property of another or the life or limb of any person, the information would have charged an offense under the law. As the information stands it merely pleads conclusions of law."

In view of the foregoing it is our thought that the answer to the second inquiry of the opinion request is in the negative.

CONCLUSION

It is therefore the opinion of this department that when a member of a township board in a township organization county, is employed by the board to maintain the roads of a district of the township; said board member accepts such employment, maintains the roads, and is paid compensation for his labor from the district's funds; absent facts showing a violation of some specific provision of any of the sections from 231.150 to 231.330 RSMo 1949, he cannot be prosecuted for a criminal offense under the provisions of Sections 231.320 and 231.330 RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Yours very truly

JOHN M. DALTON
ATTORNEY GENERAL

PEC:ma

COUNTY: Cedar County is liable for the
COUNTY COURT: payment of the premiums on the
COUNTY COLLECTOR: surety bond of the County
SURETY BOND OF COUNTY COLLECTOR: Collector of that county for
LIABILITY FOR PREMIUMS: the year of 1956.

April 16, 1956

FILED

18
Honorable Joe W. Collins
Prosecuting Attorney
Cedar County
Stockton, Missouri

Dear Mr. Collins:

We acknowledge receipt of your opinion request of April 5, 1956, in which you ask the following:

"Enclosed find certified copy of Court Order made by our County Court on February 4, 1955.

"All county officers who are required to give a bond, including the County Collector, have given Surety Bonds, in compliance with the order, and the County Court has paid the premiums on all the bonds for 1955.

"The Court has also paid the premiums on all of the county officers' surety bonds for 1956 except the Collector's. Our County Court has refused payment of the premium on the Surety Bond of the County Collector for the year 1956. The County Collector budgeted for the premium on his bond in his budget for 1956.

"I would like to know if the County Court may lawfully discriminate against the County Collector. As they have paid the premiums on all other surety bonds, would they not also be compelled to pay the premium on the bond of the County Collector."

Having both the opinion request of March 21, 1956, which has been withdrawn by you as of recent date, and the one in question, the facts are sufficiently clear. Under the withdrawn opinion request, this office could not determine

Honorable Joe W. Collins

definitely whether or not the bonds in question had been consented to by the county court. Under the opinion request with which we are now concerned (April 5, 1956), there is no approval by the county court of the county collector's bond. However, such approval is found in the certified copy of the court's order attached to the withdrawn opinion request of March 21, 1956. Thus, the facts of both opinion requests will be used to render an opinion upon the opinion request of April 5, 1956.

Section 52.020, Cum. Supp. 1955, requires the county collector to give bond. It reads in part as follows:

"Collector--bond--deposits of collections.-- Every collector of the revenue in the various counties in this state, and the collector of the revenue in the city of St. Louis, before entering upon the duties of his office, shall give bond and security to the state, to the satisfaction of the county courts, and, in the city of St. Louis, to the satisfaction of the mayor of said city, in a sum equal to the largest total collections made during any one month of the year preceding his election or appointment, plus ten per cent of said amount; provided, however, that no collector shall be required to give bond in excess of the sum of seven hundred and fifty thousand dollars, conditioned that he will faithfully and punctually collect and pay over all state, county and other revenue for the four years next ensuing the first day of March, thereafter, and that he will in all things faithfully perform all the duties of the office of collector according to law. * *"

The certified copy of the court's order of December 20, 1954 approving the surety bond of the county collector meets the requirements of the above quoted section.

Now, see Section 107.070, RSMo 1949, which reads as follows:

"Surety Bond, officers may give, when-- cost, how paid.--Whenever any officer of this state or of any department, board, bureau or commission of this state, or any deputy, appointee, agent or employee of any such officer; or any officer of any county or this state, or any deputy, appointee, agent or employee of any such officer, or any officer of

Honorable Joe W. Collins

any incorporated city, town, or village in this state, or any deputy, appointee, agent or employee of any such officer; or any officer of any department, bureau or commission of any county, city, town or village, or any deputy, appointee, agent or employee of any such officer; or any officer of any district, or other subdivision of any county, or any incorporated city, town or village, of this state, or any deputy, appointee, agent or employee of any such officer, shall be required by law of this state, or by charter, ordinance or resolution, or by any order of any court in this state, to enter into any official bond, or other bond, he may elect, with the consent and approval of the governing body of such state, department, board, bureau, commission, official county, city, town, village, or other political subdivision, to enter into a surety bond, or bonds, with a surety company or surety companies, authorized to do business in the state of Missouri and the cost of every such surety bond shall be paid by the public body protected thereby." (Emphasis ours.)

Under the latter section, it has been held that the county cannot be held liable for the premiums on a county collector's bond unless the consent and approval thereto of the county court be of record. *Boatright v. Saline County*, 169 S.W. 2d 371, 350 Mo. 945.

It appears that the Cedar County court, through its record, has both approved and consented to the county collector's bond, and that the county is thereby liable thereon under Section 107.070, supra. The certified copies of the court's order of February 4, 1955 and 1956 show that the court on those dates, has, through its order, "Now on this day the Cedar County Court after due consideration has requested that all County officials who are required to give Bond to give a Surety Bond," "consented and approved" within the meaning of Section 107.070, supra, to the collector's entry into the surety bond.

In the case of *Berry v. Linn County*, 195 S.W. 2d 502, the court said at l.c. 503:

Honorable Joe W. Collins

"The intent of Section 3238 is clear. It provides when an officer chooses to give a surety company bond, the cost of it shall not be imposed on the county unless the county agrees.

"A county court speaks only through its records. The only record we have here is the formal approval of the bond itself required by other statutes. There is no record showing the necessary authorization for Berry to give a surety company bond. Without such record the county may not be charged for the cost. Boatright v. Saline County, 350 Mo. 945, 169 S.W. 2d 371."

From the plain wording of the statute, Section 107.070, supra, and the cases which have been cited, it appears that the county is liable for the premiums on the bonds where, as in this case, the bond was entered into by the officer through the record consent and approval of the county court.

CONCLUSION

It is, therefore, the opinion of this office that Cedar County is liable for the payment of the premiums on the surety bond of the County Collector of that county for the year of 1956.

Very truly yours,

John M. Dalton
Attorney General

HLH:hw

ELECTIONS:

ELECTION EXPENSES:

The same person may serve as a judge or clerk of a municipal bond election and at the same time serve as a judge or clerk of a special state referendum election, providing that such person is duly appointed by proper authority and can physically discharge the duties relating to both elections. Further, a county may recover from the state the expenses of conducting a special referendum election within the limits of a municipality where a municipal question

is submitted to a vote at the same time and both elections are conducted by the same officials.



January 20, 1956

Honorable Frank D. Connett, Jr.
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office, which reads as follows:

"I have been approached by the mayor of the City of St. Joseph, Missouri, as to the possibility of the City of St. Joseph holding a bond election pursuant to Sections 95.145, 95.150 and 95.155, RSMo 1949, on the same day as the State's special bond election, i.e., January 24, 1956.

"In order for this to be accomplished, it would be necessary for the city and county political committees of each political party to collaborate in the furnishing of lists of judges and clerks and for the St. Joseph City Council and Buchanan County Court to collaborate and appoint the same judges and clerks. This is necessary so that the County Clerk's registration books could be used in both elections. The judges of the election would then have to return to each clerk the proper ballots and tally sheets.

"My questions are these:

"1. Would such a procedure as outlined above be lawful?

"2. If such a procedure is lawful, would it prevent Buchanan County from recovering its costs of the state bond election from the State Treasurer as provided by Section 111.405?"

You first inquire as to whether the same persons may serve as judges and clerks of a special state referendum election and a city bond election when both elections are held on the same day.

We know of no constitutional or statutory provisions which would prohibit the holding of a city bond election on the same day as a special state referendum election. Nor do we know of any constitutional or statutory provision which would prohibit the same person from serving as a judge or clerk of a city bond election and at the same time serve as a judge or clerk of a special state referendum election, providing that such person was duly appointed by proper authority and could physically discharge the duties relating to both elections.

You next inquire if a county would be entitled to recover the costs of the state bond election under the provisions of Section 111.405 if a city election is held on the same day and the same persons serve as judges and clerks of election.

Section 111.405, RSMo Cum. Supp. 1953, provides as follows:

"That hereafter when a question is submitted to a vote of all of the electors throughout the state, and no other question is submitted for a vote at the same election, all costs of such election shall be borne by the state, and after audit by the state comptroller, the state treasurer shall pay the amounts claimed by and due the respective political subdivisions out of any moneys appropriated by the legislature for that purpose."

Said section authorizes and directs the state to bear the costs of an election wherein a question is submitted to a vote of all the electors throughout the state and no other question is submitted for a vote at the same election. Said provision is clear and unequivocal in its terms. Your attention is invited to the title of said Act which provides: (Laws 1951, p. 832).

"AN ACT providing that the state shall pay all election costs of any election wherein only a state-wide question is submitted."

It is a familiar rule of statutory construction that the title of an act is essentially a part of the act and is, itself, an active expression of the general scope of the bill and therefore, it may be looked to as an aid in arriving at the intention of the Legislature.

Hon. Frank D. Connett, Jr.

Hurley v. Eidson, 258 S.W. (2d) 607.

While we are convinced from the above noted act and title that the state would be precluded from bearing the expenses of an election where a local issue is submitted for a vote at the "same election", it must be determined here whether a municipal bond election held on the same day as the state special bond election and conducted by the same election officials duly appointed by both the county court and the city is, in fact, and in law the "same election" as contemplated by the Act. We believe that it is not. It would seem to be clear that if a municipality decided to hold a bond election, appointed its own election officials and designated its own polling places, the mere fact that it was held on the same day as a special state election would not make it the same election. In such an instance, and under such circumstances, the two elections are authorized and called by separate authority, present different issues (city and county), are conducted by separate officials and at different polling places. Now suppose that the call is for the same day, but that the city and county can and do agree upon, and appoint the same election officials, use the same polling places, and it is not otherwise physically impossible for the same persons to discharge the duties of election officials in regard to both elections. Is such any different than the first instance? The elections are not the same merely because they are conducted by the same officials for said persons are acting in a dual capacity, duly appointed by proper authority of the city and of the county with separate responsibilities and duties to each.

It is our opinion that the holding of a city bond election on the same day as a state special bond election, under the procedure you have outlined, would not prevent the county from recovering the expenses of the state bond election as provided by Section 111.405, RSMo 1953.

CONCLUSION

It is, therefore, the opinion of this office that the same person may serve as a judge or clerk of a municipal bond election, and at the same time serve as a judge or clerk of a special state referendum election, providing that such person is duly appointed by proper authority and can physically discharge the duties relating to both elections.

We are further of the opinion that the holding of a municipal bond election on the same day as a special state referendum election

Hon. Frank D. Cennett, Jr.

would not prevent the county from recovering the expenses of the state referendum election from the state as provided in Section 111.405, RSMo 1953.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Denal D. Guffey.

Yours very truly,

John M. Dalton
Attorney General

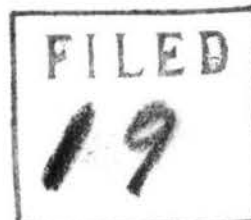
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COUNTY COURTS:
CIRCUIT COURT'S
BUDGETARY ESTIMATES:

1. The preparation of the budget for foster homes for neglected and delinquent juveniles is the function of the juvenile court, and the inclusion by the county court in the court's budget for the circuit court's estimate is a purely ministerial function for the county court.
2. Mandamus will lie to enforce the county court to perform this ministerial function.

January 27, 1956

Honorable Frank D. Connett, Jr.
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri



Dear Mr. Connett:

In your letter of January 3 you state that the county court reduced the circuit court's \$8,000 budget estimate for foster home care of neglected and delinquent juveniles to \$1,000, without the circuit court's consent. You then ask:

1. What would be the legal effect of the budget as to this particular item if it is finally adopted and the appropriation order made with only \$1,000 budgeted and appropriated for foster home care for neglected and delinquent children;
2. What may the circuit court do to prevent the county court from finally adopting and appropriating the money for this budget without their consent to the change in their estimates.

The authority for "foster homes" for neglected or delinquent children in counties of the first or second class is found in Chapter 211, RSMo 1949, Sections 211.010 to 211.300, inclusive.

Section 211.020 provides the circuit courts with original juvenile court jurisdiction.

Section 211.040, among other things, provides that:

" * * * Pending the disposition of any case, the child may be retained in the custody of the person having charge of the same, or may be kept in some place of detention provided by the county, or by any association having for one of its objects the care of delinquent or neglected children, or in such

Honorable Frank D. Connett, Jr.

other custody as the court may direct."

Section 211.050 provides that the juvenile court may, after finding that a child is a neglected one, commit it " * * * to the care of some reputable person of good moral character, or to the care of some association willing to receive it. * * * "

Section 211.090 precludes the commitment of a child to a place where it might associate with convicted adults and provides that the juvenile court may make an order for the temporary care of any child coming within the provisions of this chapter.

Section 211.110 provides that after the juvenile court determines that a child is delinquent it may place the child " * * * in a suitable family home * * * or it may authorize the child to be boarded out in some suitable family home, in case provision is made by voluntary contribution or otherwise for payment of the board of such child, until suitable provision may be made for the child in a home without such payment; * * * ."

Section 211.120 provides that the juvenile court shall retain the jurisdiction of the neglected and delinquent cases.

Section 211.130 provides that the juvenile court shall have the power to withdraw a "child sent to any institution or association or person at any time, and to make other provision therefor."

Section 211.160 provides that the court may compel the parents to support neglected or delinquent children when able " * * * otherwise the necessary support of the child shall, until the court shall commit the child to a person or institution willing to receive it without charge, be paid out of the funds of the county, only, however, upon the approval of the judge of the juvenile court."

In view of these various provisions of Chapter 211, to the effect that only the juvenile court can authorize the expenditures in question there can be no doubt, we think, about the preparation and submission of the budget for foster

Honorable Frank D. Connett, Jr.

home care of neglected and delinquent juveniles being a proper function or activity for the circuit court.

We enclose an opinion to the Honorable Ray G. Cowan, Judge of the Juvenile Court of Jackson County, dated January 12, 1951, on the question of the county court interfering with the budget estimates of the circuit court.

Presently, the section that prohibits such is 50.640, RSMo 1949.

It is the opinion of this office that the inclusion of the circuit court's estimate on these matters in the county budget becomes a purely ministerial function for the county court. The circuit court's estimate becomes as much a part of the budget as though the county court actually included the whole amount submitted. See *Gill v. Buchanan County*, 142 S.W. (2d) 665.

On the point of what action the circuit court may take see the attached opinion to Honorable Richard K. Phelps, Prosecuting Attorney of Jackson County, dated September 20, 1955. This shows that mandamus will lie to enforce a county court to perform a purely ministerial function. Although it is on the question of an assistant prosecuting attorney's salary, it also supports our contention that the inclusion of the circuit court's estimate in the county budget is a purely ministerial function for the county court.

CONCLUSION

It is the opinion of this department that: 1. The failure of the county court to include in the county budget the complete budgetary estimates submitted by the circuit court for foster home care for neglected and delinquent children, has no legal effect, but once the circuit court submits the estimate the same becomes a part of the budget as though properly and fully included by the county court; 2. That mandamus will lie to enforce the county court to include the same or to issue warrants for obligations incurred thereunder.

The foregoing opinion, which I hereby approve, was pre-

Honorable Frank D. Connett, Jr.

pared by my assistant, Russell S. Noblet.

Very truly yours

John M. Dalton
Attorney General

RSN:lc
2 enclosures

COSMETOLOGY: Proper procedure to invoke against shops carrying on
LICENSE: the practice of cosmetology without obtaining a certifi-
CRIMINAL LAW: cate of registration or renewal thereof. Revocation or
suspension of operator's certificate practicing in such
shops.

March 12, 1956



Board of Cosmetology
State of Missouri
Jefferson Building
Jefferson City, Missouri

Attention: Miss Jakaline McBrayer, Secretary.

Gentlemen:

This will acknowledge receipt of your request for an opinion,
which reads:

"Will you please render an opinion to the State
Board of Cosmetology as to what may be done when
a shop owner refuses to pay the annual registra-
tion fee provided for under Section 329.041,
MoRS Cum. Supp. 1955.

Furthermore, does said Board have authority to revoke or
suspend an individual operator's license who is continuing to
practice cosmetology in such unlicensed shop."

Section 329.041, MoRS Cum. Supp. 1955, reads:

"Every shop or establishment in which the
occupation of hairdressers, cosmetologists or
manicurists is practiced shall be required to
obtain a certificate of registration from the
state board of cosmetology. The registration
year shall be from July first to June thirtieth
of each year. Every shop or establishment so
required to register shall pay to the state
an annual fee of five dollars for the first
three licensed operators in such shop or
establishment and an additional fee of one
dollar for each additional licensed operator
or apprentice. Such fee shall be due and
payable on June thirtieth of each year and
for each thirty days thereafter that such fee

Board of Cosmetology

remains unpaid there shall be added a penalty of five dollars. The certificate of registration shall be kept posted in plain view within the shop or establishment."

Ever since the foregoing statute was enacted in 1951, shops in which cosmetology is practiced have been required to obtain a certificate of registration and to thereafter renew same annually. The same statute also fixes a penalty for failure to obtain such certificate of registration which shall become due and payable on June 30th of each year and for each 30 days thereafter that the registration fee remains unpaid there shall be added a penalty of \$5.00.

In view of the foregoing statute there can be no question that any such shops carrying on the practice of cosmetology are required to obtain a certificate of registration and renew same annually.

In case such shops positively refuse to apply for a certificate of registration or renew such registration annually as provided by law, your recourse is to recover the penalty provided under Section 329.041, supra, in a civil action at law.

There is another statute that makes said shop owner subject to prosecution when refusing to obtain a certificate of registration, or renewal of said registration, as the case may be, and that is Section 329.250, MoRS Cum. Supp. 1955, which statute provided, among other things, that anyone maintaining such a shop without a certificate as required by law, or who violates any provision of said chapter upon conviction shall be adjudged guilty of a misdemeanor. Section 329.250, reads:

"Anyone who shall practice any of the occupations, maintain a shop or establishment or school in which anyone is employed who does not have a certificate as required by this chapter, or who shall act in any capacity, wherein a certificate is required, without a certificate, or who shall violate any provision of this chapter, shall, upon conviction, be adjudged guilty of a misdemeanor. Each and every day of such violation shall constitute and be a separate offense."

The imposition of a penalty amounting to \$5.00 for every thirty days the certificate of registration remains unpaid under Section 329.041, supra, is not tantamount to a crime but as hereinabove stated can only be recovered by civil action at law. However, to maintain a shop and violate any of the provisions of Chapter 329, supra, upon conviction, does constitute a crime and makes the offender guilty of a misdemeanor.

We see no reason why any such shop owner, employing licensed operators under Chapter 329, supra, without said shop owner having

Board of Cosmetology

obtained a certificate of registration or renewal thereof, cannot be both sued for the penalty and prosecuted for having violated the provisions of said chapter as hereinabove provided.

In *Kenney vs. Commissioner of Internal Revenue*, 111 Fed. 2d 374, 376, it was held that the imposition of civil fraud penalties being a civil matter, cannot place a defendant in double jeopardy.

In *Mauch vs. Commissioner of Internal Revenue*, the court held that an acquittal by a jury on an indictment for income tax fraud does not prevent one subsequently being sued for deficiency and fraud penalties under the doctrine of double jeopardy.

In *Helvering v. Mitchell*, 303 U.S. 391, 1.c. 397, 398, Mr. Justice Brandeis delivered the opinion of the court and said, in part:

"The difference in degree of the burden of proof in criminal and civil cases precludes application of the doctrine of res judicata. The acquittal was 'merely . . . an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused.' *Lewis v. Frick*, 233 U.S. 291, 302. It did not determine that Mitchell had not wilfully attempted to evade the tax. That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled. *Stone vs. United States*, 167 U.S. 178, 188; *Murphy vs. United States*, 272 U.S. 630, 631, 632. Compare *Chantangco vs. Abaroa*, 218 U.S. 476, 481, 482. Where the objective of the subsequent action likewise is punishment, the acquittal is a bar, because to entertain the second proceeding for punishment would subject the defendant to double jeopardy; and double jeopardy is precluded by the Fifth Amendment whether the verdict was an acquittal or a conviction. *Murphy v. United States*, 272 U.S. 630, 632."

As to your last question, can the Board suspend or revoke the certificate of the individual operator in any such unlicensed shop simply because the shop owner refuses to obtain or renew a certificate of registration, Section 329.140, MoRS Cum. Supp. 1955, specifically sets out the grounds for said Board refusing a certificate to practice any of the occupations provided for in said chapter. Subsection 2 thereunder further provides said Board shall have the power to revoke or suspend certificates for anyone of the foregoing grounds. None of

Board of Cosmetology

the grounds mentioned therein relate to revocation or suspension of an individual operator's certificate for the reason the shop in which they practice is not licensed. However, we are of the opinion that if the shop owner were a licensed operator under the Cosmetology Act, his failure to obtain a certificate of registration for the shop, as required under Section 329.041, supra, would be sufficient grounds to revoke or suspend his operator's certificate under and by virtue of part one, subsection 7, and paragraph two of the foregoing mentioned statute.

Unable to find any statutory inhibition against any such individual licensed operators carrying on such a profession in the absence of some similar statutory authority penalizing or prohibiting such practice in such shops, our answer to your latter question must be in the negative, with the one exception hereinabove mentioned, and that is where the owner of the shop might also be a licensed operator. In such case where the shop owner is operating without a certificate, his operator's certificate is subject to suspension or revocation.

CONCLUSION

Therefore, it is the opinion of this department that any shops referred to in Section 329.041, MoRS Cum. Supp. 1955, violating the provisions of said section may be sued in a civil action for recovery of penalties provided therein, and in addition thereto said shop owner may be prosecuted for having violated the provisions of Chapter 329, Section 329.250, MoRS Cum. Supp. 1955.

It is further the opinion of this department that there is no statutory provision for revoking or suspending the certificate of any individual licensed operator practicing cosmetology in such shops merely because they are working in said shop, which has not obtained a certificate of registration, or renewal, as the case may be, except when said shop owner is also a licensed operator, in such instance his operator's certificate is subject to suspension or revocation by the Board.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett.

Yours very truly,

John M. Dalton
Attorney General

ARH:mw

ASSESSOR:
ANTI-NEPOTISM:
DISCRETION:
QUO WARRANTO PROCEEDINGS:

(1) The assessor, Al Schwalm, has violated the anti-nepotism section (Section 6, Article VII, 1945 Missouri Constitution), and consequently, has forfeited his office. (2) It is within the discretion of the prosecuting attorney as to whether or not he shall bring an ouster action against the assessor.

(3) The discretion to be exercised by the prosecuting attorney is not an arbitrary one, but one that must be exercised in good faith.



April 5, 1956

Honorable Frank D. Connett, Jr.
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Sir:

This will acknowledge receipt of your recent request for an opinion, which reads as follows:

"The Buchanan County Assessor's office has a number of employees, or deputies, who work full time, mostly in the office and on a straight salary. They also have another type of employee, that of deputy field assessor. The field assessor goes out into the county and makes assessments. His salary is based directly on the amount of work he turns out. He gets paid a set price for each signed or unsigned assessment sheet (tax list).

"During the years 1955 and 1956, our County Assessor, Al Schwalm, hired his brother, Clarence Schwalm, as deputy field assessor. Clarence Schwalm has worked in the capacity of deputy field assessor for the past two years. He was paid in the year 1955 on the above-mentioned basis but payment to him has not been made in 1956, although he has worked. It would appear that this is in violation of Article 7, Section 6, of the Missouri Constitution.

"However, Clarence Schwalm was never sworn into office as a deputy assessor as provided for in Chapter 53, Section .060, RSMo 1949. He merely picked up his book and started assessing when it was impossible for his brother, Al Schwalm, to find anyone else to do the job.

Honorable Frank D. Connett, Jr.

"Any mistake made by Mr. Al Schwalm was made in good faith and the job Mr. Clarence Schwalm got is certainly not a desirable or highly paid one. Our questions are these:

"1. Under this set of facts, has Assessor Al Schwalm violated the anti-nepotism section of the Missouri Constitution, Article 7, Section 6, and thereby forfeited his office?

"2. If the answer to the first question is that Al Schwalm has violated the anti-nepotism section of the constitution, has the prosecuting attorney, in the light of all the facts, any discretion as to whether or not he should proceed to bring an ouster action against the said Al Schwalm?"

Your first question is whether or not the assessor, Al Schwalm, has violated the anti-nepotism section of the Constitution.

Article VII, Section 6, Constitution of Missouri, 1945, reads as follows:

"Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment."

A reading of this section indicates that there are three necessary elements which must exist before there has been a violation of said section. First, the party to be charged must be a public officer or employee in this state. Secondly, he must name or appoint, by virtue of his office or employment, some party to public office or employment. Thirdly, the party named or appointed must be a relative within the fourth degree either by consanguinity or affinity.

That the first and third elements exist in the facts presented in the opinion request is unquestionable. It has been held that a mayor comes within the above-quoted section. *Ferguson v. State of Missouri ex inf. Ellis*, 54 S. Ct. 559, 291 U.S. 682, 78 L. Ed. 1070. It has also been held that a member of a school board is within the section. *State ex inf. McKittrick v. Whittle*, 63 S.W. 2d 100, 333 Mo. 705. The

county assessor is a public officer. The cases supporting this proposition are too numerous to cite. As to the third element, a brother is a relative in the second degree by consanguinity.

The only possible question as to whether there has been a violation of the anti-nepotism section is as to whether or not the second element is present; that is, whether or not the party to be charged has named or appointed a party to public office or employment in view of the fact that the brother, Clarence Schwalm, was never sworn into office.

The opinion of this office is that the above-quoted anti-nepotism section has been violated, and that, consequently, the office has been forfeited. This position is taken despite the fact that the oath was not taken under Section 53.060 RSMo 1949, which is as follows:

"Every assessor, except in the city of St. Louis, may appoint as many deputies as he may need, to be paid as provided by law. Each deputy shall take the same oath and have the same power and authority as the assessor himself. The assessor shall be responsible for the official acts of his deputies."

There are several reasons for sustaining this position. It is doubtful that the provisions of the section just quoted are related to the anti-nepotism section. Even if they are, the brother, Clarence Schwalm, was at least a de facto officer. See *State vs. Gray*, 190 So. 224, 192 La. 1081. Thus the assessor has appointed a party who is a de facto deputy assessor. Such an act is, it seems, within the prohibition of the anti-nepotism section. The purpose of said section is to prevent the office holder from creating a "family office" by putting his relatives within a certain degree, in his office. He, the party to be charged, forfeits by doing the act forbidden. *State v. Ellis*, 28 S.W. 2d 363.

A further reason in substantiating the opinion is that the anti-nepotism section does not limit the prohibition to appointment to public office; it also prohibits the public officer from naming or appointing a relative within the fourth degree to employment. Even if it could be said that there was no appointment to public office by reason of the fact that no oath was taken, it appears that the brother, Clarence, secured public employment. He was paid in 1955. The section expressly prohibits such, and for this reason, there was an automatic forfeiture of the office.

A third ground for sustaining the opinion is that to hold otherwise would result in allowing the public officer to do indirectly that which he could not do directly, to wit, putting his brother in his office. What would prevent others from doing the same? Again, this was what was intended to be prohibited by the Constitution.

Honorable Frank D. Connett, Jr.

Such a scheme plainly violates the Constitution, and the act of putting it into operation results in a forfeiture of his office.

Secondly, you ask whether or not you, as prosecuting attorney, have any discretion in bringing an ouster action against the said Al Schwalm.

It is the opinion of this office that you, as prosecutor, do have a discretionary power in this type of proceeding.

See State ex inf. Folk v. Talty, 166 Mo. 529, 66 S.W. 361, for a discussion of the question of discretion. In that case, the circuit court was petitioned to bring a writ of mandamus against a certain party. The circuit court issued a writ of mandamus commanding the circuit attorney to bring an information in the nature of quo warranto. The Supreme Court held that the circuit court had no authority to compel the circuit attorney to bring such an information; that the discretion is lodged with the Attorney General, or the circuit or prosecuting attorney to bring or not to bring such ouster proceedings.

Having the power of discretion does not mean, necessarily, that a public officer can refuse to act. The discretion to be exercised by the prosecuting attorney is not an arbitrary one, but one that must be exercised in good faith. In the case of State ex inf. McKittrick v. Wymore, 132 S.W. (2d) 979, an ouster action was brought against the prosecuting attorney for abuse of the discretionary power of his office. In holding that the prosecutor was to be ousted from his office, the court said at l.c. 986:

"He also argues that he is a quasi judicial official, and as such vested with discretion in the performance of duty.

"We also agree that in performing his duties he is authorized to exercise a sound discretion. However, 'there is nothing sacred about the words quasi judicial'. In Ex parte Bentine, 181 Wis. 579, 196 N.W. 213, 215, 216, it was correctly ruled as follows: 'A public prosecutor is a quasi judicial officer, retained by the public for the prosecution of persons accused of crime, in the exercise of a sound discretion to distinguish between the guilty and the innocent, between the certainly and the doubtfully guilty'. Of necessity, 'in distinguishing between the certainly and doubtfully guilty', the prosecuting attorney should make a reasonable effort to discover witnesses and interview

Honorable Frank D. Connett, Jr.

them with reference to the facts. After doing so he should give careful consideration to both the law and the facts before determining the question of prosecution or no prosecution. He has no arbitrary discretion, and sound discretion is not usable as a refuge for unfaithful prosecuting attorneys.

"The rule is stated as follows:

"It is the duty of the prosecuting attorney to initiate proceedings against parties whom he knows, or has reason to believe, have committed crimes. * * * The fact that his duties rise to the dignity of exercising discretion cannot excuse neglect of duty on his part.* * *

"The contention made by the appellant is to the effect that, because a wide discretion is vested in the prosecuting attorney with reference to the prosecution of parties for crime, the right of discretion must necessarily shield him from indictment or prosecution for omission to perform his duties. This court takes a contrary view of the law. It is the duty of the prosecuting attorney, under the statute, though endowed with discretion in the performance of his duties, to exercise his discretionary powers in good faith'. *Speer v. State*, 130 Ark. 457, 198 S.W. 113, 114, 115."

However, it is beyond the power of this office to inform you in the exercise of that discretion. Discretion is personal to the party having the power. It is to be exercised by the party having the discretionary power according to his own judgment and conscience, uncontrolled by the judgment or conscience of others.

CONCLUSION

It is, therefore, the conclusion of this office that;

(1) The assessor, Al Schwalm, has violated the anti-nepotism section (Section 6, Article VII, 1945 Missouri Constitution), and, consequently, has forfeited his office.

(2) It is within the discretion of the prosecuting attorney as to whether or not he shall bring an ouster action against the assessor.

Honorable Frank D. Connett, Jr.

(3) The discretion to be exercised by the prosecuting attorney is not an arbitrary one, but one that must be exercised in good faith.

Yours very truly,

JOHN M. DALTON
Attorney General

HLH/vlw/bi

COUNTIES:
COUNTY POOR
FUND:
COUNTY ROAD
AND BRIDGE
FUND:
COUNTY BUDGET:

FILED
19

1. Money derived from the sale by a county of dairy herds owned by the county must be deposited in the county poor fund.
2. The money derived from the sale of ninety per cent of machinery by a county must be deposited in the county road and bridge fund where ninety per cent of such machinery was originally purchased with money from the county road and bridge fund.
3. None of such moneys to be spent this year, but all should be kept in such funds and be accounted for and used for expenditures included in next year's budget.

April 10, 1956

Honorable Frank D. Connett, Jr.
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Mr. Connett:

Your request for an opinion from this office reads as follows:

"Buchanan County owns two dairy herds. It is the desire of the county court that these two dairy herds be sold and replaced with herds of beef-type cattle.

"If the county should sell these two dairy herds, must the money they receive from the sale of these herds go into the general fund and be kept there until budgeted next year or may they take the money from the sale and purchase beef-type cattle even though there was no such provision made in the budget?

"Just recently the county court sold some junk machinery and we would like to know what to do with the proceeds of that sale. Ninety per cent of the machinery was originally purchased from the road and bridge fund moneys. It is my idea that this money would have to be placed in the treasurer's office to the credit of the road and bridge fund and not be expended until next year. I would appreciate your advice as to whether or not that would be the correct disposition of the money."

Buchanan County, Missouri, under the terms of Section 48.020, RSMo 1949, is classified as a class two county.

Honorable Frank D. Connett, Jr.

Section 205.610, RSMo 1949, requiring the county courts of each county in this state to provide, at the expense of the county, support for poor persons who are inhabitants of the county, reads as follows:

"The county court of each county, on the knowledge of the judges of such tribunal, or any of them, or on the information of any magistrate of the county in which any person entitled to the benefit of the provisions of sections 205.580 to 205.760 resides, shall from time to time, and as often and for as long a time as may be necessary, provide, at the expense of the county, for the relief, maintenance and support of such persons."

The request states that the county owns two herds of dairy stock, and that the county court contemplates the sale of these two herds. There is submitted in your request the question:

"If the county should sell these two dairy herds, must the money they receive from the sale of these herds go into the general fund and be kept there until budgeted next year or may they take the money from the sale and purchase beef-type cattle even though there was no such provision made in the budget?"

The request does not state that the two dairy herds owned by Buchanan County were acquired by the county under the authority of the county to provide for the support of the poor by appropriating, annually, funds from the revenue of the county with which the county purchased such dairy herds to provide and did provide thereby, at the expense of said county, for the relief, maintenance and support of such poor persons while inmates of the poorhouse or poor farm by supplying them with necessary raw material to be converted by their labor into articles of use, and for their support,

Honorable Frank D. Connett, Jr.

nor that such dairy herds were a necessary equipment for the poor farm, but since Sections 205.610, 205.640, 205.660 and 205.670, severally, authorize the equipment of the county poor farm and other uses of such county poor fund, therefor, and since the request does state that said county does own the two dairy herds, based upon that knowledge and the fact that it is common knowledge that dairy products such as milk, cream, butter and cheese may be supplied for the inmates of such poor-houses for their benefit and support and welfare from dairy herds of cattle, we assume that the two dairy herds referred to were acquired by Buchanan county under the authority of some or all of the statutes relating to the support of the poor in that county.

It is clear, we believe, that under the terms of Section 205.740, RSMo 1949, the money received, in the event of the sale of the two dairy herds, as proposed, and if carried out by the county, money received from such sale should be placed in the fund for the support of the county poor. Said Section 205.740 reads as follows:

"All money that shall come into the hands of the superintendent from the sale of farm products, stock or other articles belonging to the county, and all other money belonging to the county that shall come into his hands from other sources, except by warrants drawn in his favor by the county court, shall be paid into the county treasury and placed with the fund for the support of the poor, and a receipt taken for the same."

Said section is created by the terms of Section 205.670, which reads as follows:

"The several county courts shall set apart from the revenues of the counties such sums for the annual support of the poor as shall seem reasonable, which sums the county treasurers shall keep separate

Honorable Frank D. Connett, Jr.

from other funds, and pay the same out
on the warrants of their county courts."

We believe this money should be kept and expended in strict compliance with the budget laws of this state applying to counties in class two, found in Chapter 50, RSMO 1949. Section 50.570 of that Chapter provides, among other statutes to be considered, directions for the preparation of a class two county budget. That section provides that on or before December first of each year, each department, office, institution, commission, or court receiving its revenue in whole or in part from the county shall prepare and submit to the budget officer estimates of its requirements for expenditures and its anticipated revenue for the next budget year with the corresponding figures for the last completed fiscal year and estimated figures for the ensuing year. The expenditures estimated shall be classified to set forth the data by funds (emphasis ours), organization units, character and objects of expenditure.

We believe such money derived from the sale of such dairy herds and is so paid into the county poor fund must be kept there until the next year's budget is made up. The money should not be spent this year to purchase beef-type cattle. Such cattle cannot be purchased with such funds at any time until authorized as an expenditure provided for in next year's budget.

This, we believe, answers your first question to the effect that the county may not take the money derived from the sale of the two herds of dairy stock, if such sale is consummated, and purchase beef-type cattle where there has been no provision made for it as an expenditure in the county budget.

The second question submitted is:

"What is to be done with the proceeds of the sale by the county of machinery, as junk, ninety per cent of which was originally purchased with money from the road and bridge fund moneys?"

This question is based upon the statement in the request

Honorable Frank D. Connett, Jr.

that ninety per cent of such machinery so sold, as junk, was originally purchased with the road and bridge fund money. We believe that since ninety per cent of such machinery was purchased with money from the road and bridge fund it follows that the money realized from the sale of ninety per cent of such machinery should be deposited in the road and bridge fund in the office of the county treasurer and be kept there until next year's budget is being made up. Such money may not be spent this year and must be included in expenditures as authorized to be made in next year's budget.

We therefore believe that your view that money derived from the sale of ninety per cent of the machinery by the county which, as the request states, was purchased originally with money of the road and bridge fund, and that such money should be placed in the county treasury to the credit of the road and bridge fund and not be expended until next year as an expenditure provided for in next year's budget, is correct.

CONCLUSION

It is, therefore, considering the premises, the opinion of this office that money which may be received from the sale of the dairy herds noted in the request, assuming that such herds were acquired by the county with money from the county poor fund, and the money received from the sale by the county court of ninety per cent of such machinery, in each case, respectively, should be deposited in the county poor fund, and in the county road and bridge fund, and not be spent this year, but all of such money to be accounted for and disbursed next year as provided in the next year's budget plans covering each of said funds.

The foregoing opinion, which I hereby approve, was prepared by my assistant, George W. Crowley.

Very truly yours

John M. Dalton
Attorney General

CONSERVATION COMMISSION: The Missouri Conservation Commission not authorized under present Constitution and laws to adopt a retirement program for employees.



April 27, 1956

Missouri Conservation Commission
Jefferson City, Missouri

Attention: Mr. I. T. Bode

Gentlemen:

This will acknowledge receipt of your request which reads in part:

"Does the Conservation Commission have power or authority to set up a retirement program for its employees, with contributions by employer and employees."

Subsequent to receipt of your request you informed the writer that you desired to know if such a retirement program can be adopted by said Conservation Commission, without the necessity of further constitutional amendments or act of the Legislature.

The Conservation Commission of this state is a creature of the Constitution being vested with certain authority by virtue of said Constitution.

Under Section 40(a), Article IV, Constitution of Missouri, the control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wildlife resources of the state and administration of all laws pertaining thereto is vested in the Conservation Commission.

Section 42, Article IV of the Constitution of Missouri, 1945, authorized the Director, appointed by the Commission, with approval of said Commission, to appoint assistants and employees for said Conservation Commission and said Commission shall fix the qualifications and salaries of said employees.

Missouri Conservation Commission

Section 43 of the same Article restricts the use of all fees, money or funds arising from the operation and transactions of said Commission and from the application and administration of laws and regulations pertaining to wildlife and its resources. It shall be expended and used by said Commission for the control, management, restoration, conservation and regulation of such wildlife, forestry and wildlife resources of the state, purchase of property, and for the administration of laws pertaining thereto.

Section 44 of said amendment merely provides that the aforesaid articles 40 to 43, inclusive, shall be self-enforcing and laws not inconsistent therewith may be enacted in aid thereof.

It is quite apparent from reading the foregoing constitutional amendments that if said Commission can adopt such a retirement program for its employees, without the aid of further constitutional amendments, or an act of the Legislature, it is by reason of the power vested in the said Commission therein, to fix salaries of its employees and by reason of Section 44 providing that said Article shall be self-enforcing.

The word "salary" has been defined in many different ways, to a large extent upon its use in a particular law in which it appears. In some instances it has been construed very broadly and all-inclusive, in others it has been defined in a restricted or limited manner. We find no Missouri decision defining the word "salary" to include a so-called retirement pay; however, in some states the courts have construed the word "salary" to include so-called deferred payments. However, such construction by foreign courts is not binding on the State of Missouri but merely persuasive. In *re Rosing's Estate*, 85 S.W. 2d. 495, 337 Mo. 544.

In *Matthews vs. Board of Education of Town of Irvington, Essex County*, 102 Atl. 2d. 110, 111, 29 N.J. Super, 232, the Superior Court of New Jersey held honorarium payments made to a school teacher in addition to a contract salary, while no matter how described were, in essence, an addition to salary but were not a part of his salary within the pension statute which allowed a pension of one-half of his compensation being received at the time of retirement, and that the teacher was entitled to only one-half of the contract salary.

In *Bridges vs. City of Charlotte*, 20 S.E. 2d. 825, the Supreme Court of North Carolina held benefits from retirement fund established by The Teachers and State Employees' Retirement Act constituted deferred payments of salary.

Missouri Conservation Commission

In *Casey v. Trecker*, 66 N.W. 2d. 724, 728, 268 Wis. 87, the Supreme Court of Wisconsin held that wages and salary are synonymous although salary usually refers to a superior grade of services, and compensation for services may include salary and expenses for personal services rendered.

In *Treu vs. Kirkwood*, 268 Pac. 2d. 482, 486, 42 C(2d.) 602, the Supreme Court of California held that generally, usage of words "salary" and "compensation" are interchangeable and are synonymous. While salary has been in some instances broadly construed we are inclined to be of the opinion that it was never the intent, as used in the Conservation Commission amendment, to authorize the Conservation Commission to adopt a retirement pay program for its employees.

The Constitution of the State of Missouri is not a grant but a limitation on legislative power, so that the Legislature may enact any law not expressly or inferentially prohibited by the Constitution of the State or United States. *State ex rel. Creamer vs. Blair*, 270 S.W.(2d) 1; *Hickey vs. Board of Education of City of St. Louis*, 256 S.W.(2d) 775, 363 Mo. 1039. In other words, the people may, by constitutional amendment, reserve to themselves, or some other designated agency, authority that otherwise the General Assembly could normally control by legislation.

Section 39(a) Article III, Constitution of Missouri, provides that the General Assembly shall have no power to grant public money, or property, or lend, or authorize the lending, of public credit to private persons, associations or corporations except in certain specified examples not related to your case.

Section 39 of the same Article places another inhibition on the Legislature, by providing that it shall have no power to give or lend, or to authorize the giving or lending, of the credit of the State in aid or to any person or association, municipality or other corporation or to pledge the credit of the state for the payment of liabilities, present or prospective of any individual, association or municipality.

In all instances heretofore to our knowledge, before pensions or retirement programs became effective, some constitutional authority was granted followed by enabling legislation to carry same into effect. Examples of a few are as follows: Until the 1945 Constitution of Missouri was adopted there was no mention of a retirement program for state highway employees in the Missouri Constitution. Neither had the Legislature enacted any legislation for same. Under section 30,

Missouri Conservation Commission

Article IV, Constitution of Missouri, 1945, it specifically allocated all state revenue derived from highway users as an incident to their use or right to use the highways of the state, including license fees, taxes on motor vehicles, fuels, etc. to a special fund which stands appropriated without legislative action for certain specific purposes. However, there are exceptions thereto, one of which is that such revenue so appropriated shall be less the cost of the share of the Highway Department in any retirement program for state employees as may be prescribed by law. Supplementing said constitutional provisions, the 68th General Assembly of the State of Missouri enacted what is now known as Chapter 104, Mo.RS Cum. Supp. 1955, which is a very comprehensive retirement program for such highway employees.

There is also a so-called retirement program for school teachers, employees and officials of educational institutions of the state by reason of Section 25, Article VI, authorizing payments of benefits for retirement and pension to persons employed and paid out of any public fund for educational services. The General Assembly of the State of Missouri passed enabling legislation in Chapter 169, MoRS Cum. Supp. 1955.

Section 27 of Article V of the Constitution provides for retirement of judges and magistrates under certain conditions and circumstances and further provides that they shall receive one-half of their regular compensation until the end of their term of office, and that the Supreme Court shall prescribe the rules and procedure for same.

The 68th General Assembly of Missouri did pass legislation, Chapter 476, MoRS Cum. Supp. 1955, which has been commonly referred to as a retirement act for judges, however, it is more in the nature of legislation authorizing certain judges, who have reached the age of 65, and who have served an aggregate of twelve years as such judge, and other stipulated conditions, may, if constituted and appointed a special commissioner or referee, be entitled to receive an annual compensation or retirement compensation equal to one-third of the salary or compensation then or thereafter provided by law for the office from which he has retired. Such legislation is merely creating a position for such judges and if they accept it then they shall be entitled to compensation mentioned therein for services which they are subject to render when they are requested to do so.

Under Section 38(a), Article III, and Section 38(b), Article III, exceptions are made for aid in case of public calamity and general laws for pensions for the blind, old age assistance, aid to dependent children, crippled children or the blind, direct relief, for adjusted

Missouri Conservation Commission

compensation, bonus or rehabilitation for discharged members of the armed services and the rehabilitation of other persons.

Section 25, Article VI, vests authority in the General Assembly to authorize municipalities to provide for pensioning of salaried members of the police and fire forces, widows and minor children.

In view of the foregoing, it is difficult to conceive why the voters of this state and the members of the Constitutional Convention of 1945, would frame and adopt conservation amendments to the Constitution that failed to specifically authorize your Commission to adopt such a retirement program for your employees as was done for the Missouri State Highway Commission if it was the intent to permit it to be done.

In *Hickey vs. Board of Education of the City of St. Louis*, 256 S.W.(2d) 775, 1.e. 777, the Court held that by the weight of authority expenditures of public money for workmen's compensation for public employees are for public purposes and are not grants of public money. In the foregoing decision the Supreme Court points out that the statutory law of Missouri authorizes in clear and unambiguous terms that a school teacher may elect to become an employee under the Workmen's Compensation Law of Missouri. The Legislature has unmistakably recognized workmen's compensation as a benefit upon disability or death under the teacher's pension provision, and recognized its own power to either require or permit the district to pay workmen's compensation for its employees. The teacher's provision referred to herein is Section 25 of Article VI, Constitution of Missouri, specifically authorizing payments from any public fund for benefits upon retirement, disability or death to persons employed and paid out of any public fund for educational services and to their beneficiaries or estate. It is apparent from the foregoing decision that the validity of such payments was by reason of said constitutional amendment empowering the Legislature to authorize such payments.

Another recent instance may be cited which we think further supports the conclusion that the Commission may not adopt such a retirement program is when the State of Missouri entered into an agreement with the Federal Government for old age and survivors insurance for its employees.

In 1950 Congress amended the Social Security Act in several particulars, however, the one we desire to call to your attention is the addition of a new section to said law providing for voluntary agreement between states and Federal Government for coverage of state and local employees under said old age and survivors insurance

Missouri Conservation Commission

provisions of said Act.

An opinion was requested by the then Governor of the State inquiring if the State under our Constitution could enter into such an agreement with the Federal Government for coverage of its government employees and if the answer was in the affirmative what legislation would have to be enacted to enable the State to enter into such an agreement?

The Department rendered an opinion holding that the State could enter into such an agreement by virtue of said amendment to the Social Security Act and under Sections 37 and 39 of Article IV of the Constitution of Missouri relating to public welfare. Again we find it was necessary to have constitutional and legislative authority to participate in Old Age and Survivors Insurance Program.

We might further add that in 1941 this Department rendered another opinion holding that the Board of Regents of the Southeast Missouri State College cannot, in the absence of an enabling act of the General Assembly, plan for pensioning of teachers.

There are a number of states that now have in full force and effect retirement programs for all state employees. None of these programs were adopted prior to the legislation setting up the proper procedure for creating the board or trustees, placing them under bond, providing for the matching of funds by the State, and other procedural matters, all of which consist of a very complete and comprehensive program. It is difficult to conceive how this can otherwise be done.

So far as we know it has never been officially determined whether or not the Conservation Commission of this State is authorized to expend any fees or money derived from Conservation practices in the absence of an appropriation by the General Assembly. However, the Constitution itself does not specifically read that such money shall stand appropriated as it does in the case of the Highway Commission of the State of Missouri. Furthermore, heretofore all Conservation Commissions have seen fit to seek an appropriation from the Legislature and the Legislature has always appropriated for that agency. While such action on the part of the Commission is not conclusive on the question of whether it is necessary to obtain an appropriation, it does carry some weight and is at least persuasive. *Williams v. Williams*, 30 S.W.(2d) 69, 325 Mo. 963; *State vs. Freeland*, 300 S.W. 675, 318 Mo. 560.

While the following decisions deal more particularly with pensions

Missouri Conservation Commission

what is said is rather pertinent and we quote, in part, from State v. Kimmell, 256 Mo. 611, 1.e. 630 and 631, 165 S.W. 1067:

"* * * True it is that old age pensions have their advocates; school teachers, theirs; public service employees, engaged in hazardous employments for the benefit of the public theirs; judicial pensions, theirs; and police pensions, theirs. But neither the one class nor the other can attain their desires through lawmaker in his statute or through court in its decision so long as the Constitution of 1875 remains as it now stands an insurmountable stumbling block in the way. It goes without saying that we are not speaking of aid to dependent and aged worthy poor, whose sustenance by state aid may be referable to an exercise of the police power called into play perhaps by patriotic gratitude for services rendered. The remedy is in a change in the Constitution and it is vain to seek it elsewhere. * * *"

In State v. Ziegenheim, 144 Mo. 283, the Court in holding a statute providing persons serving as policemen for twenty years may be retired on one-half pay for the remainder of life, unconstitutional as a grant of public money in aid of individuals in violation of the Constitution, said in part:

"* * * They are officers of the State, however, and the Constitution has declared, that, like all others holding official stations, they must rest content with the remuneration fixed by law, and after their services have been performed, no matter how valuable they may have been, the city can not, as a gratuity or pension, 'grant public money to or in aid of any individual,' and the courts have no power to require it to be done. * * *"

Notwithstanding the fact that Section 44 of Article IV of the Constitution of Missouri provides that Article IV shall be self-enforcing, it further provides laws not inconsistent therewith may be enacted by the General Assembly. We believe it was the intent in adopting that amendment, that for most purposes such as control, management, restoration, conservation and regulation of wildlife and forestry in this State it should be selfenforcing. Furthermore, that fees, monies or funds for the operation and transactions of said Commission and from application of administrative laws and regulations pertaining to such administration shall be used for

Missouri Conservation Commission

such purposes and shall be expended only by the Commission for those purposes, however, that it was not the intent or the purpose of such amendments to create a retirement program for the Conservation Commission employees or it would have clearly declared such intent as in the case of the Highway Commission.

CONCLUSION

Therefore, it is the opinion of this department that the Missouri Conservation Commission cannot legally adopt a retirement program for its employees in the absence of some constitutional authority to do so and an enabling act of the Legislature.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett.

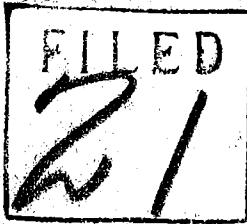
Yours very truly,

John M. Dalton
Attorney General

ARH:mw

TOWN MARSHAL:
COUNTY TREASURER:
OFFICERS:
COMPATIBILITY:

Offices of night marshal and county treasurer are compatible.



March 5, 1956

Honorable George Q. Dawes
Prosecuting Attorney
Iron County
Ironton, Missouri

Dear Mr. Dawes:

This office is in receipt of a request for an opinion which reads in part as follows:

"I have also been requested by our County Court to inquire into another matter. Our County Treasurer is presently holding the position of night marshal of the City of Ironton. I would appreciate your opinion of whether these two positions are incompatible. The treasurer accepted the marshal's job after his election to county office. See section 54.040."

In answer to this request it is best to first quote Section 54.040 RSMo 1949, which is as follows:

"No sheriff, marshal, clerk or collector, or the deputy of any such officer, shall be eligible to the office of treasurer of any county."

At the first reading, the words in the above section appear plain and there did appear to be no doubt that they provide that a person serving as a marshal shall not be eligible to the office of county treasurer. However, our Supreme Court, in a detailed and thorough analysis of the above statute from the standpoint of its effect and the intentions of its enactors, came to a different conclusion. In the matter of State ex inf. Noblet, Prosecuting Attorney, ex rel. McDonald v. Moore, 152 S.W. 2d 86, quo warranto was sought to oust Mrs. Moore as ineligible under the above quoted statute. At the time of her election, Mrs. Moore was a township collector. In considering the question on page 87, it was stated by the court:

Honorable George Q. Dawes

"Investigating the history of the statute involved, we find it in the Revised Statutes of 1835 on page 153 in substantially the same form except that no 'marshal' was mentioned. It is included in an article entitled 'County Treasuries', in which article the duties of collectors, clerks and other officers are also prescribed. The clerk referred to in the statute is without a doubt the county clerk, or the clerk of a court of record; the sheriff, the county sheriff; and the collector, the county collector. It should be noted that when the statute was enacted all the officers made ineligible for office of treasurer were at the least county officers. As a matter of fact township officers were not provided for until many years later."

In regard to the term marshal, it was further stated by the court on page 87:

"In the Revised Statutes of 1855 on page 1467 we find that the office of marshal, likewise a county office, was established for the County of St. Louis and this officer was added to the statute in question and made ineligible to the office of county treasurer."

From the above, it seems that the term marshal was clearly intended to be a county marshal, as the term clerk meant county clerk and collector, the county collector. We believe that that conclusion can be determined from the reasoning of the judge.

There remains in your question one of common law compatibility of the two offices. Reading of Chapter 79 RSMo 1949 in regard to the duties of a town marshal reveals that the town marshal is an elected officer. He also may be elected town marshal and town collector at the same election, in the event such election is provided for by ordinance in accordance with Section 79.050.

Section 79.230 provides that the mayor may appoint other officers including a night watchman with the consent and approval of the board of aldermen. We fail to see, however, how the aforesaid sections can affect such a position which is described as night marshal. Having no notice of the ordinances that may be enforced in the City of Ironton creating the position, duties and tenure of night marshal, we cannot exactly say that the two offices are compatible. It is, however, felt that insofar as the state law is concerned, there is nothing to cause ineligibility or in-

Honorable George Q. Dawes

compatibility in accordance with Section 54.040 supra and State v. Moore supra. Section 54.040 cannot be interpreted to make a city night marshal ineligible to the office of county treasurer.

We have found no state law prohibiting the holding of the two positions at the same time.

CONCLUSION

It is the opinion of this office that the positions of night marshal of a city of the fourth class and treasurer of a county of the fourth class are compatible positions and may be held at the same time by the same person.

The foregoing opinion, which I hereby approve, was prepared by my assistant, James W. Faris.

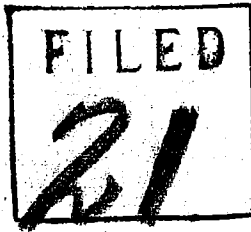
Yours very truly,

JOHN M. DALTON
Attorney General

JWF/bi

LINCOLN UNIVERSITY:
AUTHORITY OF BOARD OF CURATORS:
DALTON VOCATIONAL SCHOOL:
LEASE OF SCHOOL PROPERTY:

The Board of Curators of the Lincoln University has, in the absence of funds to carry on the operation of the vocational school as such, the authority to lease Dalton Vocational School for one year to an independent public school district.



April 12, 1956

Honorable Earl E. Dawson
Acting President
Lincoln University
Jefferson City, Missouri

Dear Mr. Dawson:

This will acknowledge receipt of your opinion request of March 29, 1956, which is as follows:

"The Board of Education of Keytesville R-3 Public Schools, Keytesville, Missouri, has requested the privilege of leasing the classroom building at the Dalton Vocational School, Dalton, Missouri, for use by their colored pupils for the academic term beginning September 1, 1956 and ending May 31, 1957.

"Perhaps you will recall that the 68th General Assembly appropriated funds for the operation of this school for only one year of the current biennium (1955-1956) and that the Board of Curators will be forced to discontinue the operation of the Dalton Vocational School at the close of the current term ending May 31, 1956.

"The Board of Curators of Lincoln University respectfully requests your opinion with respect to the following questions:

1. Does the Board of Curators have the power and authority under the existing laws to lease the Dalton Vocational School properties and/or facilities to an independent public school district?
2. Are there any legal arrangements whereby the Board of Curators might authorize the Keytesville R-3 Public School District to use the classroom building at the Dalton Vocational School for the above period (September 1, 1956 to May 31, 1957)?

Honorable Earl E. Dawson

"The Curators will appreciate having the opinion of your office on the above questions."

The control of the Dalton Vocational School is placed in the Board of Curators of the Lincoln University by Section 175.070, RSMo 1949, which is as follows:

"The board of curators for Lincoln university shall take over and conduct the demonstration farm and agricultural school for the Negro race as now established at Dalton, Missouri, and the supervision and control of said school is hereby invested in the board of curators for the Lincoln university."

The only real question involved is the question of the authority of the Board of Curators of Lincoln University in the operation and management of the Dalton Vocational School. It becomes necessary to look at the statutes in determining such. Section 175.040 reads as follows:

"It is hereby provided that the board of curators of the Lincoln University shall organize after the manner of the board of curators of the state University of Missouri; and it is further provided, that the powers, authority, responsibilities, privileges, immunities, liabilities and compensation of the board of curators of the Lincoln University shall be the same as those prescribed by statute for the board of curators of the state University of Missouri, except as stated in this chapter."

Notice that it is provided in the section that the Board of Curators of Lincoln University shall have the same powers and authorities as those prescribed by statute for the Board of Curators of the State University of Missouri. Sections 172.010 and 172.020 RSMo 1949, set forth the powers and authority of the board of curators of the University of Missouri. They read as follows:

"172.010. A university is hereby instituted in this state, the government whereof shall be vested in a board of curators."

"172.020. The university is hereby incorporated and created a body politic, and shall be known by the name of 'The Curators of the University of Missouri,' and by that name shall have perpetual succession, power to sue and be sued,

Honorable Earl E. Dawson

complain and defend in all courts; to make and use a common seal, and to alter the same at pleasure; to take, purchase and to sell, convey and otherwise dispose of lands and chattels; to act as trustee in all cases in which there be a gift of property or property left by will to the university or for its benefit or for the benefit of students of the university; to condemn and appropriate real estate or other property, or any interest therein, for any public purpose within the scope of its organization, in the same manner and with like effect as is provided in chapter 523, RSMo 1949, relating to the appropriation and valuation of lands taken for telegraph, telephone, gravel and plank or railroad purposes; provided, that if the curators so elect, no assessment of damages or compensation under this law shall be payable and no execution shall issue before the expiration of sixty days after the adjournment of the next regular session of the legislature held after such assessment is made, but the same shall bear interest at the rate of six per cent per annum from its date until paid; and provided further, that the curators may, at any time, elect to abandon the proposed appropriation of property by an instrument of writing to that effect, to be filed with the clerk of the court and entered on the minutes of the court, and as to so much as is thus abandoned, the assessment of damages or compensation shall be void; provided, that the curators shall not have power to sell or convey any land contained within the university campus."

That the government of the University of Missouri shall be vested in the Board of Curators of that university is also provided in Section 9(a), Article IX of the 1945 Constitution of Missouri. The section reads as follows:

"Section 9(a). State university--government by board of curators--number and appointment--The government of the state university shall be vested in a board of curators consisting of nine members appointed by the governor, by and with the advice and consent of the senate."

Section 9(b) reads as follows:

Honorable Earl E. Dawson

"Section 9(b). Maintenance of state university and other educational institutions.--The general assembly shall adequately maintain the state university and such other educational institutions as it may deem necessary."

The source of sections 9(a) and (b), just quoted, is Section 5, Article XI, of the 1875 Constitution of Missouri which reads as follows:

"The General Assembly shall, whenever the Public School Fund will permit and the actual necessity of the same may require, aid and maintain the State University now established with its present departments. The government of the State University shall be vested in a Board of Curators, to consist of nine members, to be appointed by the Governor, by and with the advice and consent of the Senate."

It was conceded in the case of Heimberger vs. Board of Curators of the University of Missouri, 268 Mo. 598, 188 S.W. 128, that this section (Section 5, Article 9 of the 1875 Constitution) deprived the general assembly of the power to disestablish the University of Missouri or any department thereof in existence when the Constitution (1875) was adopted. It appears that the same construction would be applied under the present sections-9(a) and 9(b) of the Constitution. There is no such constitutional provision as section 9(a) relating to Lincoln University and the Board of Curators thereof. Also notice that by Section 9(b), the general assembly shall adequately maintain the state university and such other institutions as it may deem necessary. By this section, the government and control of Lincoln University is left to the General Assembly. Query, then, as to whether the scope of authority of the Board of Curators of Lincoln University is as broad as that of the Board of Curators of the University of Missouri. In the absence of such a section as 9(a) pertaining to Lincoln University and the Board of Curators thereof, the power to divert the use of the Dalton Vocational School is in the general assembly. Whether the Board of Curators of Lincoln University has been given that authority depends upon the statutes quoted above and the implications therefrom. The court, in State vs. McReynolds, 193 S.W. 2d 611, at l.c. 612, stated the rule as follows:

"The question for decision is whether the curators have the power to borrow money for building the dormitories and issue such revenue bonds as security."

Honorable Earl E. Dawson

"This State has long followed the rule announced in Dillon, Municipal Corporations (1911) Sec. 237, so long that it has become firmly established here. 'It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation--not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied.'"

The court held that the Board of Curators of the University of Missouri had the authority under Section 172.020, supra, to issue revenue bonds for the purpose of erecting dormitories, although the power to do so was not expressly given to said board.

Other cases from this jurisdiction and others, although not determinative of the precise question involved, throw some light upon the solution of the question with which we are concerned. In the case of Corley vs. Montgomery, 46 S.W. 2d 283, the Kansas City Court of Appeals held that the power of the board of a city, town, or consolidated district, to establish ward schools carries with it, or necessarily implies, the power to abandon schools no longer required. Courts in other jurisdictions have tended to base the authority of a board of education to lease school property upon the basis of the purpose for which it was leased. Also, it seems that the power of a board of education is narrower than that of the Board of Regents or Board of Curators of a college or university. However, see Presley vs. Vernon Parish School Board, 139 So. 692, (Louisiana case) where a school board attempted to lease a portion of the school ground to a private person who intended to build a cafeteria thereon. In denying the school such authority the court held that a school board does not have the power, under the law, to lease ground acquired for school purposes unless it is for some casual use, not prejudicial to nor inconsistent with the main purpose for which the property was acquired. See also Herald et al. vs. Board of Education, 65 S.E. 102 (West Virginia case) for a similar holding. However, see Atlas Life Insurance Company vs. Board of Education of City of Tulsa, 200 P. 171 (Oklahoma case) for a more liberal view. In that case the court held that the Board of Education had the authority to lease portions of the

Honorable Earl E. Dawson

school lands to a mining corporation where the land was not needed for school purposes. See the case of State vs. Davidson, 31 S.E. 2d 255 (Georgia case) and Francis vs. Croley, 50 S.W. 2d 462 (Texas case) where the Board of Regents executed leases of certain lands belonging to the respective universities. These cases, except for the Corley case, are cited only to show that the boards in other jurisdictions have executed leases of certain school properties; they are not determinative of the question of authority of the Board of Curators in this state because of the differences between the laws in those jurisdictions and the laws of Missouri.

It is the opinion of this office that the Board of Curators of Lincoln University may lease the Dalton Vocational School as proposed in the opinion request. Said opinion is not to be construed broader than is necessary to cover the peculiar facts and circumstances presented in the opinion request. From that which has been pointed out, it is apparent that the Board of Curators of Lincoln University acts in the nature of a trustee for the state in the control and management of the Dalton Vocational School.

That the board is clothed with discretion in the exercise of its powers is shown from the following quotation taken from State ex rel. Thompson vs. Board of Regents for Northeast Missouri State Teachers College, 264 S.W. 698, at l.c. 700:

"While the board, in a sense, represents the state in the performance of its duties, it is but one of the many necessary instrumentalities through which the former is enabled to act within the scope of the powers conferred by law. These powers embody no attributes of sovereignty which would entitle them to be designated as the state's alter ego. While in a sense the board is an agent of the state with defined powers, the importance of its duties with their attendant responsibilities, is such as to necessarily clothe the board with a reasonable discretion in the exercise of same. This is inevitably true, first, because of the difficulty in framing a statute with such a regard for particulars as to cover every exigency that may arise in the future; and, second, because a restriction of the board's powers to the letter of the law would destroy its efficiency, and to that extent cripple the purpose for which the institution was created. Legislatures, therefore, moved by that wisdom which is born of experience, whether conscious or not of that aphorism that 'new occasions teach new duties;

Honorable Earl E. Dawson

time makes ancient acts uncouth,' have contented themselves with defining in general terms the powers of such boards as are here under review, leaving the discharge of duties not defined, and which may, under changed conditions, arise in the future, to the discretion of the board."

It hardly seems probable that the General Assembly intended that the Dalton Vocational School was to sit vacant and unused after the school term of May 31, 1956. Besides the non-use, it is common knowledge that buildings depreciate at a faster rate under such conditions than when used. These seem to be further reasons from which to infer that the Legislature intended that the Board of Curators was to use discretion in the exercise of its authority in the control and management of said school.

CONCLUSION

It is therefore the opinion of this office that the Board of Curators of the Lincoln University has, in the absence of funds to carry on the operation of the vocational school as such, the authority to lease Dalton Vocational School for one year to an independent public school district.

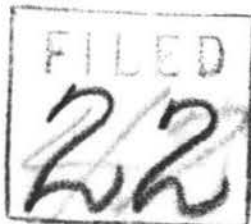
Yours very truly,

JOHN M. DALTON
Attorney General

HHH/bi

PENITENTIARY:
PRISONS:
DEPARTMENT OF CORRECTIONS:
CORRECTIONS:
APPROPRIATIONS:
LEGISLATURE:
HOUSE OF REPRESENTATIVES:
POWER PLANTS :

House Bill No. 1, 68th General Assembly, Special Session, as perfected, authorizes and permits the construction of a power plant at the Medium Security Prison for which such bill appropriates money.



April 11, 1956

Honorable Richard J. DeCoster and
Honorable Richard H. Ichord
Members, House of Representatives
Jefferson City, Missouri

Dear Sirs:

You have recently asked for an official opinion of this office, which request reads as follows:

"Would your office please render an opinion as to whether the provisions of the above bill [House Bill #1, 68th General Assembly, Special Session], as perfected, would authorize or permit the construction of a power plant at the Medium Security Institution, provided for in said bill."

We have examined that part of Section 1 of House Bill No. 1 which appropriates ten million dollars for the establishment and construction of a Medium Security Prison. The pertinent portions of this bill read as follows:

"For the establishing and constructing of a Medium Security Prison, including the construction and equipment of buildings, construction of sewer, water and electrical facilities including telephone, telegraph and electrical lines, roadways and streets, and any other construction necessary to the completion and equipment of a modern Medium Security Prison. \$10,000,000.00"

It will be noted that this specifically authorizes the construction of electrical facilities as well as other items which are generally classified as utilities, and authorizes "any other

Honorable Richard J. DeCoster and
Honorable Richard H. Ichord

construction necessary to the completion and equipment of a modern Medium Security Prison."

The power plant about which you ask would, of course, have to do with the creation of electrical power and, while it might also have to do with the creation of steam and other matters, it is felt that the specific reference to electrical facilities and the general reference to any other construction necessary is sufficient authorization for the construction of a power plant at the Medium Security Prison.

CONCLUSION.

It is therefore the conclusion of this office on the basis of the foregoing that House Bill No. 1, 68th General Assembly, Special Session, as perfected, authorizes and permits the construction of a power plant at the Medium Security Prison.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Fred L. Howard.

Yours very truly,

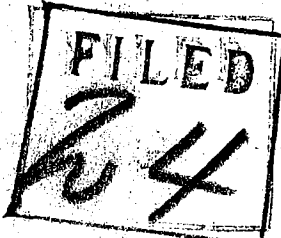
John M. Dalton
Attorney General

FLH:sm

GOVERNOR:

DEPARTMENT OF
CORRECTIONS:

Governor of State has no authority to create position of Administrator of Safety and Fire Prevention in absence of statutory or constitutional authority to do so.



January 20, 1956

Honorable Phil M. Donnelly
Governor, State of Missouri
Jefferson City, Missouri

Dear Governor Donnelly:

This will acknowledge receipt of your request inquiring if the Governor of this state is vested with authority to set up the position of Administrator of Safety and Fire Protection who will be responsible to the Director of Corrections and who will have supervision over safety and fire prevention and will also recommend a plan and program. Also may available appropriated funds be used for this purpose without an enabling act by the Legislature.

We have found very little authority in this state relative to the authority of the Governor to create such position.

Section 1, Article IV of the Constitution of Missouri vests in the Governor of the state the supreme executive power.

The Department of Corrections is a part of the Executive Department of the State of Missouri. Section 12, Article IV, Constitution of Missouri provides that the Executive Department shall consist of all state elected and appointive officials and employees, except those in the legislative and judicial departments. In addition thereto it further provides for other elective officials specifically naming certain departments of the state and concludes by permitting such additional departments, not exceeding five in number, as may hereinabove be established by law.

Section 2 of Article IV of the Constitution prescribes the duties of the Governor of this state, that he shall take care that the laws are distributed and faithfully executed and shall be the conservator of peace throughout the state.

Article III of the Constitution of Missouri provides for three distinct departments of government: judicial, executive

Honorable Phil M. Donnelly

and legislative. Furthermore, that the powers properly belonging to any one of them shall not be exercised by the other departments.

Section 19, Article IV of the Constitution provides for the selection and removal of personnel in the departments of the government; that the head of each department may select and remove all employees of the department except as otherwise provided by law. It specifically provides that all employees of penal institutions shall be selected on a basis of merit.

Section 27, Vol. 67, C.J.S., page 156, reads, in part, as follows:

"In the absence of constitutional provisions, the method of filling offices is to be determined by the legislature. An office created by the legislature is wholly within that body's power, and it may prescribe the mode of filling the office, and, if the statute creating the office provides how it shall be filled, it must be filled in that manner."

Volume 81, C.J.S., Section 60, page 982, reads, in part, as follows:

"The governor has no prerogative powers, but possesses only such powers and duties as are vested in him by constitutional or statutory grant. The extent and exercise of the governor's powers under statute will depend on the particular provisions thereof. * * * * *"

In *Tucker vs. State*, 35 N.E. 2d. 270, 1.c. 291 and 292, we find the following declaration as to the powers of the Governor:

"Governors are almost always vested with the executive powers of the state. That the executive power is the power to execute the laws, to carry them into effect as distinguished from the power to make the laws and the power to judge them, and that the power to appoint the subordinate officers and employees through whom the laws are executed

Honorable Phil M. Donnelly

is a necessary incident to the power to execute the laws, * * * * *

"* * * *The creation of the offices is a legislative function. The appointment of officers is an executive function. * * * * *"

In State ex rel. Rosenthal v. Smiley, 263 S.W. 825, 304 Mo. 549, the court held only the Legislature has power to create a public office, other than a constitutional office, as an instrumentality of government.

In re Opinion of the Justice, 32 So.(2d) 539, 249 Ala. 637, it was held the Governor could not appoint members to an interim committee in the absence of statutory authority.

Chapter 36, RSMo 1949, relates to the merit system in the State of Missouri. Section 36.030, Subsection 2 thereof, makes the provisions of said chapter applicable to all officials, positions and employees, of the State Department of Public Health and Welfare and the State Department of Corrections. Sections 36.100, 36.110, and 36.120, RSMo 1949, provides that the Director of the Division of Personnel shall allocate each position and classify same. Section 36.240, RSMo 1949, provides that the appointing authorities shall choose from the three highest ranking, available, eligibles certified to him by the Director. The present method of selection and appointment of officers and employees is entirely different from former methods.

Chapter 216 and 217, RSMo 1949, provides for the appointment of chief administrative officers of the Department of Corrections by the Director thereof and in some instances such authority is vested in other officials, not the Governor, however, except that the Governor does appoint the Director of the Department by and with the advice and consent of the Senate.

It is apparent that the general and accepted rule that a public official has only such authority as may be specifically granted by the statute and Constitution of this state, applies, likewise, to the Governor of the State.

The General Assembly in passing enabling legislation creating the Department of Corrections specifically provided

Honorable Phil M. Donnelly

for the appointment of certain officials and prescribed their official duties. Evidently that body was of the opinion it was the duty and obligation of the General Assembly to do so. Furthermore, if the Governor of this State could at any time create an office or position and prescribe its official duties pertaining to same, it can be seen, there is a probability that in so doing, there might be a conflict of duties and responsibilities.

CONCLUSION

Therefore, it is the opinion of this department that the Governor of this state is not vested with such authority to create the position of Administrator of Safety and Fire Protection within the Department of Corrections in the absence of any statutory or constitutional authority to do so. In view of this conclusion we deem it unnecessary to discuss the question relating to the use of available appropriations for this purpose.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Aubrey R. Hammett, Jr.

Very truly yours,

John M. Dalton
Attorney General

ARH:rw:hw

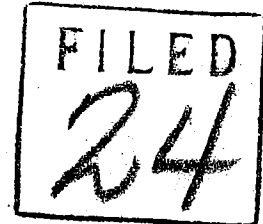
ELECTIONS:
COMMISSIONERS OF ST. LOUIS
CITY CANNOT CHANGE CONGRESSIONAL
DISTRICT BOUNDARIES:

Article III, Section 45 of the
1945 Missouri Constitution and
Chapter 128 RSMo 1949 as amended
by RSMo Cumulative Supplement
1955, pages 270 and 271,
authorizes General Assembly

only to subdivide state into congressional districts and change
boundaries of same. Board of Election Commissioners of City of
St. Louis cannot change boundaries of First and Third Congressional
Districts in city.

February 23, 1956

Honorable Michael Doherty, Chairman
Board of Election Commissioners
208 South 12th Boulevard
St. Louis 2, Missouri



Dear Mr. Doherty:

This department is in receipt of your recent request for
a legal opinion reading as follows:

"In re: Opinion concerning Wendell Pruitt
Housing Units Nos. Mo. 1-4 and
Mo. 1-5 in the vicinity of Jeffer-
son, Carr, Hogan and Cass Avenues.

"Dear General:

"The above stated housing units has the district
line dividing the First and Third Congressional
Districts running through the buildings. The
one main entrance to these buildings is located
in Congressional District No. 3. It is very
evident that the district lines followed the
streets at the time they were laid out, however,
in the planning and construction of this particu-
lar unit, the streets were eliminated and the
Board of Election Commissioners is vitally con-
cerned over the district line running through
these buildings with only one main entrance as
aforesaid, and we are desirous of obtaining an
opinion from your office as to whether or not
we could place the entire buildings in the dis-
trict wherein the entrance is located, or what
other action in your opinion, if any, can we
take concerning the division of those districts
by said district line running through these
buildings.

Honorable Michael Doherty, Chairman

"May I further advise you that in this particular project above mentioned there are three separate buildings affected, and that the said congressional district line cuts through said buildings.

"Will you, therefore, be kind enough to render an opinion to this office as to whether or not we can place the entire unit of buildings in the congressional district wherein the entrance is located, or what action can this Board take to remedy this situation."

We understand the inquiry to be whether or not the Board of Election Commissioners of St. Louis, Missouri, can alter or change the boundaries of Congressional District No. 3, so as to include territory now in District No. 1, in order that all of the buildings in the Wendell Pruitt Housing Unit will be in District No. 3.

Chapter 118, RSMo 1949, is in regard to the registration of voters and conducting of elections in cities containing over 600,000 inhabitants, and is applicable to the City of St. Louis. Section 118.150 requires the Board of Election Commissioners of such cities to divide them into election precincts, and to revise and rearrange same.

Sections 118.153 and 118.156, RSMo Cumulative Supplement 1955, provide how an election precinct should be established, consolidated, and elections conducted in such cities when voting machines are used. Section 118.150, RSMo 1949, reads as follows:

"It shall be the duty of the board to divide and keep divided such cities into election precincts regarding ward lines, where such lines exist, and composed of compact and contiguous territory, which shall contain so far as practicable approximately five hundred voters. The board may revise, subdivide or rearrange any precinct or precincts at any time it may deem necessary. The precincts in each ward shall be numbered from one upward, consecutively. In special election the board may at its discretion for the purpose of such election consolidate two or more precincts into one and use only one set of precinct officials for such election."

Honorable Michael Doherty

Article III, Section 45, Constitution of Missouri, 1945, provides how congressional apportionment shall be made, and reads as follows:

"When the number of representatives to which the state is entitled in the house of the congress of the United States under the census of 1950 and each census thereafter is certified to the governor, the general assembly shall by law divide the state into districts corresponding with the number of representatives to which it is entitled, which district shall be composed of contiguous territory as compact and as nearly equal in population as may be."

Chapter 128, RSMo 1949, is in regard to election of electors, electoral districts and congressional districts. We are concerned here only with that portion of the chapter dealing with subdividing the state into congressional districts. Said portion of the chapter has been repealed and new sections have been enacted, as shown at pages 270 and 271, RSMo Cumulative Supplement, 1955. We note that under these statutes the state has been subdivided into eleven congressional districts. Section 128.211 fixes the boundaries of the First Congressional District and is composed of territory in St. Louis City and St. Louis County. Said section reads as follows:

"The first district shall be composed of the following townships from St. Louis County, St. Ferdinand, Airport, Normandy, Washington, Midland; and the following wards and precincts in the city of St. Louis; Ward 1, precincts 1 to 28, inclusive; ward 2, precincts 1 to 28, inclusive; ward 3, precincts 1 to 30, inclusive; ward 4, precincts 1 to 12, inclusive, and precincts 21, 22, 23, 27, 30; ward 5, precincts 2, 3, 4, 5, 6, 7, 8, 15, 16, 17, 18, 23, 24, 25, 26, 27, 28; ward 18, precincts 4, 5, 6; ward 19, precincts 6, 7, 21; ward 20, precincts 1 to 26 inclusive; ward 21, precincts 1 to 26 inclusive; ward 22, precincts, 1 to 28, inclusive; ward 26, precincts 4, 5, 6, 7, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25; ward 27, precincts 1 to 25, inclusive; ward 28, precincts 12, 13, 14, 15, 16."

Honorable Michael Doherty

Section 128.231, fixes the boundaries of the Third Congressional District which is composed of wards and precincts in the City of St. Louis. Said section reads as follows:

"The third district shall be composed of the following wards and precincts in the city of St. Louis; ward 4, precincts 13, 14, 15, 16, 17, 18, 19, 20, 24, 25, 26, 28, 29; ward 5, precincts 1, 9, 10, 11, 12, 13, 14, 19, 20, 21, 22, 29, 30; ward 6, precincts 1 to 31, inclusive; ward 7, precincts 1 to 31, inclusive; ward 8, precincts 1 to 28 inclusive; ward 9, precincts 1 to 29, inclusive; ward 15, precincts 1 to 27, inclusive; ward 16, precincts 1 to 27, inclusive; ward 17, precincts 1 to 26, inclusive; ward 18, precincts 1, 2, 3, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29; ward 19, precincts 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29; ward 23, precincts 13, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36; ward 24, precincts 1 to 28, inclusive; ward 25, precincts 1 to 24, inclusive; ward 26, precincts 1, 2, 3, 8, 9, 10, 11, 12, 13, 14, 15, 26, 27; ward 28, precincts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26."

Section 118.150, supra, makes it the duty of the board of election commissioners to divide and keep divided, the City of St. Louis into election precincts, with reference to ward lines (if any) so that the territory of each shall be compact and contiguous and contain approximately five hundred voters. It shall be the further duty of the board to revise, subdivide, or rearrange any precinct when it is believed such action is required.

In view of the statutory duties of the board, it might be contended that the board would be authorized to rearrange the precincts in any manner they believe to be necessary, and they could take any precinct or ward from one congressional district and place it in another one. With such a contention we do not agree for very obvious reasons.

Honorable Michael Doherty

Section 118.150, supra, gives the board the power to divide the city and keep it divided into election precincts with respect to ward lines, where they exist, and to rearrange such precincts within the respective wards. No power is given the board either expressly or impliedly by this, or any other section of the statutes to take wards or precincts from one congressional district and place them in another one. In fact no mention is made of congressional districts whatsoever in Section 118.150, supra. Shifts of this nature would in fact be the altering or changing congressional district boundaries by the board, who would be given the final determination as to what congressional district a territory should be located in, and thereby defeat the action of the Legislature in fixing the congressional district boundaries.

We repeat that the General Assembly has divided the state into eleven congressional districts and has fixed the boundary of each as required by the constitution. While it is unfortunate that the buildings of the housing units referred to in the opinion request are located within the First and Third Congressional Districts, apparently it would be more practical to have all the buildings located in one congressional district. However, since the General Assembly is the governmental body authorized by law to change or alter the boundaries of the congressional districts in the state, the present situation now existing in St. Louis is one which must be brought to the attention of the lawmakers in the hope that they may see fit to make the proposed change of boundaries of said congressional districts.

In view of the foregoing and in answer to the inquiry of the opinion request it is our thought that the board of election commissioners lacks the power, and can in no way alter or change the boundaries of the First and Third Congressional District in the City of St. Louis, Missouri, by taking territory from the First District and placing it in the Third District.

CONCLUSION

It is the opinion of this department that Article III, Section 45 of the 1945 Missouri Constitution, and Chapter 128, RSMo 1949, as amended by RSMo Cumulative Supplement 1955, pages 270 and 271, authorizes the General Assembly only, to subdivide the state into congressional districts and to change the boundaries of said districts as necessity may require. The board of

Honorable Michael Doherty

election commissioners of the City of St. Louis, Missouri, lacks the power, and cannot change the boundaries of the First and Third Congressional Districts in said city by taking territory from the First and placing it in the Third District.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

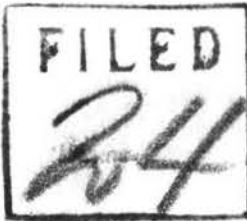
Yours very truly,

John M. Dalton
Attorney General

PNC:ma,vlw

ELECTIONS:

ABSENTEE VOTING:



Closing of voter registration in City of St. Louis pursuant to Sec. 118.240 RSMo 1949 does not prevent execution of absentee ballot subsequent to such closing date. Canvassers of absentee ballots measure qualifications of such voters by registration law applicable to City of St. Louis, Chap. 118 RSMo 1949, saving an exception to those voting an official war ballot.

October 31, 1956

Honorable Michael J. Doherty
Chairman, Board of Election Commissioners
208 South 12th Boulevard (2)
St. Louis, Missouri

Dear Mr. Doherty:

This opinion is rendered in reply to your inquiry reading as follows:

"The Board of Election Commissioners directed me to write you concerning absentee voting. Under Section 112.020 of the Revised Statutes of Missouri, 1949, in substance, provides that an application for an absentee ballot may be made within 30 days before an election. In the City of St. Louis the statutes provide that the registration shall close on the 24th day before an election, which is October 13, 1956, and on the 19th and 20th of October a canvass is made of all the precincts by the regular precinct clerks, and, of course, after the canvass is made on October 24, 25, 26 and 27, a revision then takes place. Many of the names which appear on the voting lists are stricken off on account of some having left the city and some having moved to other places and not having transferred according to law.

"However, assuming that an absentee voter has moved prior to the canvass and is stricken off, and has already received an absentee ballot and casts his ballot by mailing it in to the Board and, of course, on the envelope containing the ballot is an affidavit to be signed by the voter in the presence of a Notary Public, and should the date of the Notary Public's attestation be

Honorable Michael J. Doherty

after the 19th or 20th of October and the voter's name has been stricken from the rolls and not been reinstated during the revision, would the Election Board be obliged to count said vote or should it be rejected?"

Section 118.020 RSMo 1949 provides:

"In all cities of this state now having, or which hereafter have, six hundred thousand inhabitants, or more, according to the last decennial census of the United States, there shall be a registration of all qualified voters, and the registration of voters and the conduct of elections held in such cities shall be governed by the provisions of this chapter and the provisions of the general election laws of this state, so far as the same are not inconsistent or in conflict herewith."

Section 118.240 RSMo 1949, provides, in part:

"* * * Registration for any election shall be closed at five o'clock p.m. on the twenty-fourth day preceding the election except municipal elections, when it shall be closed at five o'clock p.m. on the forty-fifth day prior to April election, and no voter shall thereafter be registered prior to said election, except by order of the circuit court on appeal as provided in section 118.410. No voter who is duly registered in compliance with the provision of this chapter shall be required to register again so long as he continues to reside at the address from which he is registered, unless his registration be canceled, as provided in this chapter."

Qualifications of voters are set forth in Section 118.030 RSMo 1949, which provides:

Honorable Michael J. Doherty

"Every citizen of the United States, including occupants of soldiers' and sailors' homes, who is over the age of twenty-one years, who has resided in the state one year immediately preceding the election at which he offers to vote, and during the last sixty days of that time shall have resided in the city where such election is held, shall be entitled to vote at all elections by the people, if properly registered, unless he comes within the following exceptions:

- (1) If he is an idiot or insane person;
 - (2) If he has been convicted of a felony, or of a crime connected with the exercise of the right of suffrage, and has not been granted a full pardon therefor;
 - (3) If he is confined to any public prison;
 - (4) If he is kept at any poorhouse at public expense;
 - (5) If he has been convicted a second time of a felony, or of a crime connected with the exercise of the right of suffrage."
- (Emphasis supplied)

A reading of Section 118.030 RSMo 1949, supra, leads to the conclusion that proper registration is a prerequisite to casting a ballot. In State ex rel. May, et al. v. Flynn, 147 S.W. (2d) 210, 235 Mo. App. 1003, 1.c. 1006, the St. Louis Court of Appeals referred to the primary purpose of this registration law in the following language:

"The primary purpose of registration laws is to prevent fraudulent abuse of the franchise, by providing in advance of elections an authentic list of the qualified voters."

The canvass referred to in the first paragraph of your letter of inquiry is authorized by Section 118.330 RSMo 1949, reading as follows:

"Immediately after the close of registration before each election preceding which a canvass is required, the board shall have verification lists prepared for each precinct.

Honorable Michael J. Doherty

Such list shall have the names and addresses of all voters registered in the precinct arranged in the same order as the precinct registers. A canvass shall be made before each general state and county election, each state and county primary and primary city elections."

We now turn to Missouri's absentee voting law found at Chapter 112 RSMo 1949. In connection with your opinion request we need not review Sections 112.300 to 112.410 of the absentee voting law since such statutes deal with the voting of an absentee war ballot, and qualified electors who vote such ballots are relieved of compliance with registration laws in the following language found in Section 112.310 RSMo 1949:

"Any elector authorized to vote under the provisions of sections 112.300 to 112.410 may vote an official war ballot without complying with the provisions of the registration laws of the precinct of his residence."

Section 112.060 RSMo 1949 provides for the opening and canvassing of absentee ballots by persons appointed by the county clerk or the board of election commissioners, and reads in part, as follows:

"* * * The persons so appointed shall take the oath prescribed for the regular judges of election and shall at once proceed to open, canvass and count such votes and, having determined that such absent voter or voters are entitled to vote in the respective precincts wherein he or they offer to vote and having been fully satisfied thereof, they shall certify to the county clerk or the election commissioners, as the case may be, the number of qualified votes to be counted for each of the respective candidates voted for in such election precinct, or for or against the question of public policy submitted at such election, and shall forthwith make such certificate to the county clerk, or to the election commissioners, as the case may be, who shall tabulate such vote along with the other votes certified from the several

Honorable Michael J. Doherty

precincts of the county and credit the same to the candidate or issue for whom or for which the absentee votes were cast in arriving at the total result of the election in the district, precinct or ward where the voter resides or lives. No ballot shall be counted by the judges which has not been received and filed by the issuing official or officials within the time required by law. * * *"
(Emphasis supplied)

The quoted portion of Section 112.060 RSMo 1949 casts a duty upon the canvassers of the absentee ballots to pass upon the qualifications of those casting absentee ballots before certifying results of such canvass to the board of election commissioners. In passing upon the qualifications of such absentee voters the canvassers are duty bound to measure the qualification of the absentee voter by the standards set forth in Chapter 118 RSMo 1949, the registration law particularly applicable to the City of St. Louis. Having heretofore concluded that proper registration is a prerequisite to a valid ballot, it necessarily follows that if an elector seeking to cast an absentee ballot has had his name stricken from the registration rolls in the course of preparation of verification lists of registered voters authorized by Section 118.330 RSMo 1949, his only recourse to maintain his registration rights is by appeal to the circuit court as authorized in Section 118.240 RSMo 1949. Upon failure to sustain registration by such procedure the absentee ballot of the voter should be rejected by the duly appointed persons canvassing such ballots.

Section 112.050 RSMo 1949 provides that the absentee ballot may be delivered to the issuing official not later than six o'clock p.m. of the day next succeeding the day of such election. No prohibition is found in the absentee voting law, Chapter 112 RSMo 1949, or in the registration law applicable to the City of St. Louis, Chapter 118 RSMo 1949, against executing an absentee ballot after the closing date of registration, and a notary public's attestation to such absentee ballot bearing such a date will not invalidate the ballot unless dated subsequent to the day of election.

CONCLUSION

It is the opinion of this office that closing of voter registration in the City of St. Louis pursuant to directives

Honorable Michael J. Doherty

contained in Section 118.240 RSMo 1949 will not prevent the execution of an absentee ballot subsequent to such closing date of registration, but the canvassers of such absentee ballots are required to measure the qualifications of such voters by the registration law applicable to the City of St. Louis and found in Chapter 118 RSMo 1949, saving an exception to those voting an official war ballot.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO'M:lw

SPECIAL REGISTRATION: Under provisions of Section 118.240 RSMo 1949,
CITIES OF 600,000: St. Louis Board of Election Commissioners, in
NOTICE REQUIRED: its discretion may hold special registrations
WHO MAY REGISTER: at times and places other than board's office,
for voters prevented by illness, physical disability, or other valid reasons from registering at board's office. Section requires previous notice of registrations and any notice, which in board's judgment, clearly advises prospective registrants of time and place or places, reasonable time in advance of registration is sufficient. Notice to be given to registrants only residing at place of registration. In holding registration at place or places, board shall register prospective registrants residing there and is not required to open place or places to public, or to register any other persons who present themselves.

November 26, 1956

FILED
24
Board of Election Commissioners
City of St. Louis
208 South Twelfth Boulevard
St. Louis 2, Missouri

Attention: Mr. Michael J. Doherty, Chairman

Gentlemen:

This is to acknowledge receipt of your recent request for our legal opinion which reads as follows:

"The Board of Election Commissioners request an opinion concerning registration in the City of St. Louis. 'Section 118.240 of the Revised Statutes of Missouri, 1949, provides for TIME AND PLACE OF REGISTRATION which, in substance, says that same shall be conducted at the office of the Board throughout the entire year open usual business days at regular office hours, and at additional hours in the discretion of the Board. The Board may also provide for and give notice of other places of registration, as in its judgment the best interest of the service require at places which shall be open for registration at such times as the Board may direct.'

"Now, therefore, we had a special registration in certain precincts in all of the 28 wards on September 18, 1956, which we gave regular notice of the time and place where same was to be held. In St. Louis we have a number of homes where aged citizens reside, some suffering from disabilities and other valid reasons which prevent their registering at the office of the Board or at other designated places such as precinct ward registrations.

Board of Election Commissioners

Now as to such persons as above stated many requests are made upon the Board to send office staff deputies to such home or homes to register said persons, and, in fact, the custom has been for some years in the past to send office deputies to register such persons. We now have some requests to register persons residing in homes such as I above described.

"In view of the Statute which says that the Board may also provide for and give notice of other places of registration, the Board requests an opinion as to whether or not it can send its office staff deputies to such home or homes to register the ones living therein only without giving any notice as has been the custom in the past. If not, what notice should be given, and would it be obligatory upon the Board to have the particular home or homes open to the public generally for registration aside from the ones living therein, or could the Board confine the registration to the ones in said home or homes?

"The Board would greatly appreciate an early reply on this for the reason that the close of the registration in St. Louis is October 13."

Section 118.030 RSMo 1949, gives the qualifications of voters and reads as follows:

"Every citizen of the United States, including occupants of soldiers' and sailors' homes, who is over the age of twenty-one years, who has resided in the state one year immediately preceding the election at which he offers to vote, and during the last sixty days of that time shall have resided in the city where such election is held, shall be entitled to vote at all elections by the people, if properly registered, unless he comes within the following exceptions:

"(1) If he is an idiot or insane person;

"(2) If he has been convicted of a felony, or of a crime connected with the exercise of the right of suffrage, and has not been granted a full pardon therefor;

Board of Election Commissioners

"(3) If he is confined to any public prison;

"(4) If he is kept at any poorhouse at public expense;

"(5) If he has been convicted a second time of a felony, or of a crime connected with the exercise of the right of suffrage."

Section 118.240 RSMo 1949 is referred to in the opinion request and provides for the time and place of registration of voters in cities having over 600,000 inhabitants and reads as follows:

"Registration shall be conducted at the office of the Board throughout the entire year, except as herein provided, upon the usual business days and at the regular office hours and at additional hours in the discretion of the board. The board may also provide for and give notice of other places of registration, as in its judgment the best interests of the service require, which places shall be open for registration at such times as the board may direct. Registration for any election shall be closed at five o'clock p.m. on the twenty-fourth day preceding the election, except municipal elections when it shall be closed at five o'clock p.m. on the forty-fifth day prior to April election, and no voter shall thereafter be registered prior to said election, except by order of the circuit court on appeal as provided in section 118.410. No voter who is duly registered in compliance with the provisions of this chapter shall be required to register again so long as he continues to reside at the address from which he is registered, unless his registration be canceled as provided for in this chapter."

Section 118.240, supra, provides that the Board of Election Commissioners shall conduct registrations at the office of the Board throughout the entire year upon usual business days and at regular office hours and at additional hours in the discretion of the Board. The Board may also provide for and give notice of other places of registration, as in its judgment, the best interests of the service require, which additional places for registration shall be open at such times as the Board may direct.

This section does not impose a mandatory duty upon the Board to hold special registration, as the provisions of said section are directory. It has been left to the discretion of the Board as to whether it

Board of Election Commissioners

will or will not hold special registrations. In the event it elects to hold the registrations, then the statute does require the board to provide for and give notice of the time and place or places of registration.

While the statutes do require the giving of notice, the method of notice has not been specified in the statute, and it appears to be the legislative intent that this matter also be left to the discretion of the Board.

From the facts given in the opinion request, it appears that in the past it has been the practice of the Board of Election Commissioners to hold special registrations of qualified voters at homes or other places where citizens reside, who, because of illness, physical disabilities, or other reasons are prevented from appearing at the Board's office and registering in the usual manner. It further appears that office staff duties of the Board have been specifically registering such citizens at their places of abode without giving any notice, and also without registering any other persons at such times and places.

In view of these facts and the provisions of Section 118.240, supra, it is believed that any kind of notice given to the prospective registrants which in the judgment of the Board would inform such registrants of the time and place of registration will be sufficient notice within the meaning of the statute.

In contemplation of the statute a special registration is to be held for the convenience of prospective registrants residing at a certain place or places only and is not for the convenience of all legal voters residing in that particular locality of the city who might desire to register at that time.

Therefore, in answer to the inquiry of the opinion request, it is our thought that in holding special registration of qualified voters, in accordance with the provisions of Section 118.240, supra, at a place or places other than the Board's office, for the benefit of prospective registrants residing at such place or places, the Board is required to provide for and give notice by that method, which, in the Board's judgment, will clearly inform the registrants of the time and place or places, a reasonable length of time in advance of the registration. The Board is not required, in giving such notice, to notify the public generally, or to open said place or places to the public generally, or to register any persons other than the residents of the place or places of registration.

CONCLUSION

It is, therefore, the opinion of this department that under the provisions of Section 118.240 RSMo 1949, the St. Louis Board of Election Commissioners may, within its discretion, hold special registra-

Board of Election Commissioners

tions of voters, at a place or places other than the office of the Board, and those voters, who, because of illness, physical disabilities or other valid reasons, are prevented from registering at the office of the Board in the usual manner. Said section requires previous notice of the registrations, but no method of notice is specified, consequently, any kind of notice which, in the Board's discretion, will clearly advise the prospective registrants a reasonable length of time in advance of the time and place or places of registration, is sufficient, and is required to be given only to the prospective registrants residing at the place or places of registration. In holding said registrations, the Board shall register only such prospective registrants, and is not required to open said place or places to the public generally, and to register any other persons who may present themselves at such time and place or places.

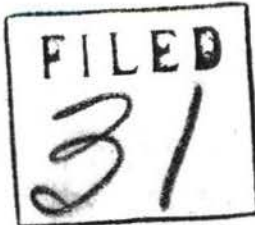
The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Very truly yours,

John M. Dalton
Attorney General

PNC/ld

OFFICERS: Offices of county treasurer of Third Class county and treasurer of Fourth Class city not incompatible and may be held by same person.



June 8, 1956

Honorable Robert H. Frost
Member, Missouri House of Representatives
Plattsburg, Missouri

Dear Sir:

This formal opinion is rendered in reply to your letter of May 10, 1956, which, referenced to my letter of May 7, 1956, addressed to you, poses the following question:

May a county treasurer of a Third Class county in Missouri also serve as city treasurer of a Fourth Class city?

A review of the statutes applicable to county treasurers found at Chapter 54, RSMo 1949 does not disclose any prohibition against a county treasurer of a Third Class county serving also as city treasurer of a Fourth Class city. The law applicable to Fourth Class cities found at Chapter 79, RSMo 1949 discloses that the position of city treasurer is an appointive office, with provision for an officer's oath and bond being mandatory.

Missouri follows the common law doctrine that incompatible offices may not be held by one person at the same time. In the case of State ex rel. Walker v. Bus, 135 Mo. 325, 1.c. 338, the Supreme Court spoke, in part, as follows, concerning the common law doctrine:

"At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him."

Honorable Robert H. Frost

No statutory prohibition against one person holding the offices of county treasurer of a Third Class county and city treasurer of a Fourth Class city has been discovered. The statutes particularly applicable to these two offices have been read together and when applying the quoted rule from State ex rel. Walker v. Bus, supra, no incompatibility between the two offices is apparent.

CONCLUSION

It is the opinion of this office that a county treasurer of a Third Class county in Missouri may also serve as city treasurer of a Fourth Class city.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON
Attorney General

JLO:M:hw

CRIMINAL LAW:
FALSE PRETENSES:

No conviction can be obtained under Section 561.450, RSMo 1949, for giving a check on a bank in which there is no account for a past due debt. Conviction can be had under Sections 561.460, RSMo 1949, and 561.470, RSMo 1949, for giving a check on a bank in which the maker has no account.

October 19, 1956

Honorable Benjamin J. Francka
Assistant Prosecuting Attorney
Greene County
Springfield, Missouri



Dear Mr. Francka:

This is in reply to your request for an opinion which reads as follows:

"This office has recently been confronted with a series of problems concerning the giving of no account checks in payment of debts. We would greatly appreciate an opinion from your office concerning the applications of Section 561.450 and Section 561.460, R.S. Mo. 49, in the following cases.

"Does Section 561.450 apply to a no account check given for a debt due? Does 561.450 apply to a check given for a past due debt? We note that Section 561.450 applies to the obtaining of any 'property or valuable thing' while Section 561.460 applies to the procuring of 'any article or thing of value or for the payment of any past due debt or obligation'.

"In case charges can not be filed in the above two instances against a person giving a no account check under Section 561.450, can they be filed under Section 561.460?

"Also, in cases where a no account check is given in violation of Section 561.450 extenuating circumstances indicate that the penalty provided

Honorable Benjamin J. Francka

under Section 561.460 would be more appropriate may charges be filed under Section 561.460?"

Your first question is whether or not Section 561.450, RSMo 1949, applies to "no account" check given for a debt due. The applicable portion of Section 561.450 is as follows:

"Every person who, with the intent to cheat and defraud, shall obtain or attempt to obtain, from any other person, or persons, any money, property or valuable thing whatever by means or by use of any trick or deception, or false and fraudulent representation, * * * or by means or by use, of any false or bogus check or by means of a check drawn, with intent to cheat and defraud, on a bank in which the drawer of the check knows he has no funds * * * shall be deemed guilty of a felony and upon conviction thereof be punished by imprisonment in the state penitentiary for a term not exceeding seven years." (Underlining ours.)

It will be noted that in addition to money and property an offense may be committed by the obtention of money "or valuable thing whatever." It is thought that since penal statutes are strictly construed to the benefit of defendants in criminal cases that the interpretation of "valuable thing whatever" might not be fitted to a debt due since the status of creditor and debtor remains unchanged by the passage of the worthless paper.

Research has disclosed the case of State v. Hack, (Mo. App.) 284 S.W. 842, in which conviction was sought under Section 3553, RSMo 1919. The case shows that the section was amended in 1925 to include the following words "or for the payment of any past-due debt or other obligation of whatsoever form or nature or who for any other purpose." The check in question in that case was given in payment for a "past-due debt." The court then said, l.c. 842:

"Whilst under section 3553, Revised Statutes of Missouri 1919, the giving of a check with intent to defraud is made a misdemeanor, and section 3554 provides that, 'as against the maker or drawer thereof, the making, drawing,

Honorable Benjamin J. Franeka

uttering or delivering of a check, draft or order, payment of which is refused by the drawee, shall be prima facie evidence of intent to defraud and of knowledge of insufficient funds in, or credit with, such bank or other depository, * * * * * yet, since it affirmatively appears in the state's case, and in fact is conceded by the state, that the check in question was given in payment of a past-due account, the prima facie case is overcome, and it must be ruled, as a matter of law, that plaintiff, having obtained nothing on the strength of this check, could not be held as for having issued the check with intent to defraud.

"It may be well to note that cases in which checks are now given for the payment of any past-due debt fall within the purview of our bad check statute, for the Legislature has amended section 3553 so that it now provides that:

* * * * *

Section 3553, mentioned above, as changed is now Section 561.460, RSMo 1949. It should be recognized that Section 561.460 is now applicable to past-due debts and, therefore, would apply to a debt due, since the Legislature has spelled it out in no uncertain terms in the 1925 amendment. It will be noted that the amendment, as it was made, added further qualifications to what formerly had been plainly "with intent to defraud." When this amendment was made, long after the enactment of Section 561.450, supra, inquired about here, the payment of any past-due debt was included as well as the words already contained therein, "any article or thing of value." In accordance with the rules for the interpretation of statutes in regard to criminal offenses, there could be no distinguishment between the ultimate meaning of the phrases "any article or thing of value and any valuable thing whatever." It is believed that the inclusion of the words in regard to the payment of past-due debts was recognition by the Legislature, in keeping with the Hack case above cited, that there was nothing obtained by the issuance of the check in the payment of a past-due debt as the debt remained due. It is, therefore, thought that the statement in the Hack case, in regard to the former wording of the Section (561.460), would be equally applicable to Section 561.450, as that latter section now stands.

Honorable Benjamin J. Franeka

In the matter of State v. Willard, 109 Mo. 243, 19 S.W. 189, at l.c. Mo. 247, in regard to a check given, the court said:

"Now it must be conceded that Cartwright was not induced to part with his possession or property in the gloves and fur robe by means of the check. It stands upon his own evidence that he voluntarily extended credit to defendant from Thursday to Saturday and delivered and charged the goods to defendant on the firm books, without receiving any other promise or agreement from defendant except to pay for them at that time.

"The giving of the check on Saturday had nothing to do with obtaining these goods. They had already been delivered to defendant, and by no sort of fiction can the transaction of Saturday be made to relate back, and make an ordinary sale on a credit, obtained by no false pretense, or trick or other 'confidence game,' a crime. It would be purely 'ex post facto.'"

It is felt that the foregoing very evidently reveals the problem involved here and is a direct answer to it. A check upon a bank in which the maker has no funds given for an account due would appear to be analogous to the situation presented in the above case. The question is not only presented by such a situation as to the consideration for the check, it also involves fraud and deceit and the instrumentality of the deceit, which induced the expectant payee to part with the "money, property, or valuable thing."

It is believed that the term false pretenses describes the element of the offense mentioned above and it, of course, must be a reliance upon the truth of the false pretenses that caused the parting with the valuable thing.

In the case of State vs. Mullins, 237 S.W. 502, l.c. 504, the Supreme Court of Missouri said:

"(4) III. It may be urged that presentation of a check drawn on the bank was prima facie a representation that the defendant had funds there. The Legislature of 1917 (Acts 1917, p. 244) passed an act incorporated in the statutes of 1919 as sections 3553 and 3554. Section 3553 relates to the offense of drawing a bogus check or checks upon a bank with insufficient funds

Honorable Benjamin J. Franoka

to meet it. It will be noted that the defendant was not prosecuted under that section but under section 3343, a general statute relating to the obtaining of money by false pretenses."

After quoting Section 3554, the section that provided for five day notice establishing intent to defraud, as is now contended in Section 561.470, the court continued at l.c. 504:

"Under that section the drawing of a check upon a bank in which the drawer has no funds would be prima facie evidence of intent to defraud unless within five days after notice of dishonor the drawer should make the drawee whole.

"For the purpose of this case we will assume, without deciding, that this section is applicable to the present transaction.* * * *"

It is, of course necessary upon any prosecution under Section 561.460 that the requisite notice provided for by Section 561.470, RSMo 1949, be given.

CONCLUSION

It is, therefore, the opinion of this office that a person cannot be convicted under Section 561.450, RSMo 1949, for giving a check on a bank in which he has no account for a debt due.

It is further the opinion of this office that a conviction can be had under the misdemeanor sections 561.460 and 561.470, RSMo 1949, against a person who gives a check upon a bank in which he has no account upon his having been given proper notice under Section 561.470, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. James W. Paris.

Yours very truly,

JWF:mw

John M. Dalton
Attorney General

LIQUOR: An illegal sale of intoxicating liquor to a minor by
LICENSEE: an agent with the knowledge and consent of the licensee
LIABILITY: renders the licensee as well as the agent liable.

FILED

32

October 15, 1956

Honorable William J. Geekie
Prosecuting Attorney
City of St. Louis
Municipal Courts Building
St. Louis, Missouri

Dear Mr. Geekie:

This is in reply to a request for an opinion of this office,
which request is as follows:

"I respectfully request the opinion of your
office as to the feasibility of 'Issuing an
Information' and obtaining a conviction from
the following set of facts:

"1. The Police Department of the City of
St. Louis makes an arrest in a liquor li-
censed establishment after observing an
agent or employee of the licensee sell,
give away, vend, or otherwise supply in-
toxicating liquor to a minor. While this
offense was taking place the licensee was
on the premises but in no way assisted or
participated in the offense. Only infor-
mation available was the fact that the
licensee was present at the time of the
sale. The agent or employee does make
the statement that the licensee has given
instructions not to sell to minors. Now
both the employee and the licensee are
'booked,' 'Sale of Liquor to Minors,'
Violation of State Statute Sec. 311.310,
and are released on bond. Question in
our mind is, under existing Missouri Law,
can the licensee be prosecuted and a con-
viction sustained?

Honorable William J. Geekie

"2. Same set of facts but go a little farther. At the time of the offense the licensee is not even on the premises. At a later time and maybe at an even later date the licensee is arrested for violation of State Statute 311.310 and released on bond.

"Bonds are returnable in both enumerated instances and disposition must be made on the Application for an Information by this office.

"A research of the law by this office has not clearly resolved this question. This office has not been able to find any recent case law or existing State Statutes which make a Principal criminally liable for the acts of his agent committed without his knowledge or consent. This office has been following this General Rule of Law, 'that the Principal cannot be held criminally liable for the acts of his agent committed without his knowledge or consent.' This being a General Rule of Law, there may be specific instances under the liquor Statutes whereby the 'General Rule' does not apply. If so, please advise.

"Checking the origin of Section 311.310, R.S. Mo. 1949 back through the year 1889, we find that the Revised Statutes of Missouri in the year 1889 definitely established criminal liability on the part of a dramshop keeper for the sale of Intoxicating Liquor to a minor when the sale was made by the agent of the dramshop keeper. Case law on this section of the Statute is contained in State - vs - McCance, 110 Mo. 398, states that an indictment under this particular section only establishes a prima facie case, which may be rebutted by competent testimony.

"The law in effect in the year 1889 was definitely clear - a licensee could be indicted for the criminal acts of his agent. The State Statutes of the year 1889 were subsequently changed and the R.S. of Mo. 1919, Section 6527, state that the dramshop keeper shall not 'suffer' intoxicating liquor to be sold

Honorable William J. Geesie

to a minor. Later years the Statute was changed and in 1939 R.S. No. Section 4885 we find that the wording was, 'No person or his employee shall sell or supply intoxicating liquor or permit same to be sold or supplied to a minor. Now, we come to our present governing Statute, Section 311.310 R.S. No. 1949, there is no reference to a licensee being criminally liable for the acts of his agent, no mention of the word suffer nor no mention of the words permit same.

"Considering the General Rule of Law, as stated above, and Section 311.310 Revised Statutes of Missouri 1949, or any other section of the State Statutes pertaining to the control of the sale of liquor, what is the opinion of your office as to problem #1 and #2 enumerated?"

We quote your entire letter herein as that portion of your letter which follows questions one and two practically answers your questions.

The statute to which you refer, Section 311.310 RSMo 1949, is in part as follows:

"Any licensee under this chapter, or his employee, who shall sell, vend, give away or otherwise supply any intoxicating liquor in any quantity whatsoever to any person under the age of twenty-one years, * * * shall be deemed guilty of a misdemeanor; provided, * * *"

The answers to your questions depend entirely upon whether or not the sale was made with the knowledge and consent of the licensee. We are, therefore, assuming, in addition to the facts stated in question No. 1, that the sale was made with the knowledge and consent of the licensee.

We find nothing in the present Missouri Liquor Law which takes this case out of the general rule of law as stated in your letter.

Honorable William J. Geekie

The general rule of law is well stated in 48 C.J.S., p. 387, par. 271, which in part is as follows:

"Where a violation of the liquor laws, such as an illegal sale, is committed or made by an agent or servant, with the knowledge and consent of the principal or master, or in pursuance of his express command, or of a general authority to such agent or servant, the principal or master is criminally liable, even though he was not present at the time. * * *"

We call your attention to the case of *City of Columbia v. Jackson*, Mo.App., 227 SW 644, where the general rule is pronounced that an illegal sale by an agent with the knowledge and consent of the principal makes the principal as well as the agent liable. In this case, at l.c. 645[2], the Court said:

"[2,3] Aside from this last, however, we think there was a case made from which the jury could reasonably find, as they did, that Williams made the sale as agent and employee of the defendant and with his knowledge and consent, and that such sale was in law the defendant's act. And this issue of whether the liquor sold was defendant's property and the sale made with his authority was specifically included in the instructions submitting the case to the jury. * * *"

The prosecution in *City of Columbia v. Jackson*, supra, was for violation of a local option ordinance; however, the same principle of law applies to the facts stated and assumed herein.

Our answer to your questions one and two, with the additional assumed fact of "knowledge and consent" on the part of the licensee, is that a licensee could be prosecuted and a conviction sustained for the sale of intoxicating liquor to a minor.

CONCLUSION.

It is, therefore, the opinion of this office that an illegal sale of intoxicating liquor made to a minor by an agent with the

Honorable William J. Geekie

knowledge and consent of the licensee renders the licensee as well as the agent liable.

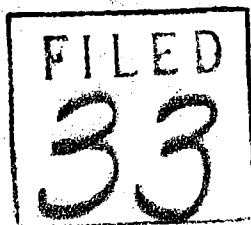
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Grover C. Huston.

Yours very truly,

John M. Dalton
Attorney General

GCH:sm

WORKMEN'S
COMPENSATION:



An application filed with the Workmen's Compensation Commission against a self-insuring company or corporation, which states that the individual filing such application was a former employee of such company or corporation and that he was unjustly discharged from such employment because he had filed a claim for compensation, and was forced to sign a statement that he was being discharged for inefficiency, does not state sufficient grounds for revoking the self-insuring privilege of such company or corporation by the Workmen's Compensation Commission.

September 26, 1956

Honorable Spencer H. Givens
Director
Division of Workmen's Compensation
Jefferson City, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"We respectfully request your opinion on jurisdiction and procedure in the matter before us described below:

"On July 20 we received 'Application for Revocation of Self-Insurer Privileges' signed by Alfred Henry Fultner, claimant, and by his attorney, Daniel J. Leary, in Injury No. MM-76843, and on July 23 we received 'Motion to Dismiss Application for Revocation of Self-Insurer Privileges' filed by Spencer, Scott & Dwyer by E. P. Dwyer, attorneys for Atlas Powder Company.

"Both of these papers are attached for your information, and if you require the case file mention (MM-76843) it will be made available to you upon your request."

To your letter you attach the "Application for Revocation of Self-Insurer Privileges" which was signed by Alfred Henry Fultner. The application discloses that one Alfred Henry Fultner had for a period of time been employed by the Atlas Powder Company, a corporation, and a self-insurer; that during the course of the employment Fultner alleged that he had suffered injuries in the course of his employment; that after a period of considerable time he was awarded by the corporation the sum of \$2400.00 as compensation for his injuries, and that immediately thereafter

Honorable Spencer H. Givens

he was discharged by the company. In his "Application for Revocation of Self-Insurer Privileges," he alleges in his first paragraph that the Atlas Powder Company operates a powder plant in Jasper County. In his second paragraph he alleges that it has qualified as a self-insurer under the provisions of the Workmen's Compensation law. Both of these allegations are obviously correct. In his third paragraph Fultner alleges that "said company is not now qualified to continue as a self-insurer and has failed to accomplish the purposes of a self-insurer." No further mention is made to this statement in the application and there is no statement by Fultner as to why the company has failed to accomplish its purpose as a self-insurer.

In paragraph five of his application Fultner goes rather thoroughly into his own case, alleging that he was injured on January 5, 1955 while in the corporation's employment; that he was hospitalized, was treated by the corporation's doctor, and that he did not return to work until March 27, 1955. He states that since that time he has worked regularly, and that he filed application for compensation on December 3, 1955; that a hearing was had on July 9 and 10, 1956, and that a compromise settlement for \$2400.00 was made at that time, July 10. Fultner also alleges that on the morning of July 11 he was discharged by plant manager Ralph Holliday and that before the company would deliver applicant his pay for the last two weeks' work he was required to sign a statement to the effect that the discharge was on account of unsatisfactory work; that he signed such statement under duress.

It would seem to be obvious that in setting forth the charge in this last paragraph, the burden of which was discrimination against an employee for the exercise of his rights, that Fultner had in mind Section 287.780, RSMo 1949, which reads:

"Every employer, his director, officer or agent, who discharges or in any way discriminates against an employee for exercising any of his rights under this chapter, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less

Honorable Spencer H. Givens

than fifty nor more than five hundred dollars, or by imprisonment in the county jail for not less than one week nor more than one year, or by both such fine and imprisonment."

We reach this conclusion because of the fact that so far as we can determine there is no other penalty section against an employer for discrimination in this way against an employee, and because it is obvious that the aforesaid section, 287.780, was meant to apply to just such a situation as Fultner alleges in his application took place.

However, it does not appear to us to follow at all that simply because the company violated Section 287.780, which it may or may not have done, that this section would provide Fultner with any base upon which to rest his application for a revocation of self-insurer privileges. The way in which an employer may become a self-insurer is set out fully in Section 287.280, RSMo 1949, which reads:

"Every employer electing to accept the provisions of this chapter, shall insure his entire liability thereunder except as hereafter provided, with some insurance carrier authorized to insure such liability in this state, except that an employer may himself carry the whole or any part of such liability without insurance upon satisfying the commission of his ability so to do. If the employer fail to comply with this section, an injured employee or his dependents may elect after the injury to recover from the employer as though he had rejected this chapter, or to recover under this chapter with the compensation payments commuted and immediately payable. If the employer be carrying his own insurance, on the application of any person entitled to compensation and on proof of default in the payment of any installment, the commission shall require

Honorable Spencer H. Givens

the employer to furnish security for the payment of the compensation, and if not given, all other compensation shall be commuted and become immediately payable; provided, that employers engaged in the mining business shall be required to insure only their liability hereunder to the extent of the equivalent of the maximum liability under this chapter for ten deaths in any one accident, but such employer may carry his own risk for any excess liability."

The penalty as set forth in Section 287.780, for a violation of that section, is that the employer may be prosecuted for a criminal misdemeanor and upon conviction may be punished by a fine or by imprisonment in the county jail or by both such fine and imprisonment. There is no mention whatever made of any effect of revocation of the self-insurer privilege of the company for a violation of this section. It is obvious that the Workmen's Compensation Department could not take jurisdiction of a charge made under Section 287.780 because it is not a court of law and a violation of this section could only be considered and heard by a court of law. If Fultner desired to file charges against the company in the magistrate court of the county in which the company is located, on the ground that the company has violated Section 287.780 he certainly could do so, but he obviously cannot do this before the Workmen's Compensation Commission, which is in no way a court of law.

We also call attention to Section 287.790, RSMo 1949, which reads:

"Any person, corporation, his or its directors, officers or agents, or any other person who violates any of the provisions of this chapter for which a penalty has not herein been specifically provided, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than fifty dollars nor more than five

Honorable Spencer H. Givens

hundred dollars or by imprisonment in the county jail for not less than one week and not more than one year or both such fine and imprisonment."

This section also makes any violations of the provisions of the chapter a misdemeanor but it does not bear upon the matter of the revocation of the self-insurer privilege.

CONCLUSION

It is the opinion of this department that an application filed with the Workmen's Compensation Commission against a self-insuring company or corporation, which application states that the individual filing such application was a former employee of such company or corporation and that he was unjustly discharged from such employment because he had filed a claim for compensation, and was forced to sign a statement that he was being discharged for inefficiency, does not state sufficient grounds for revoking the self-insuring privilege of such company or corporation by the Workmen's Compensation Commission.

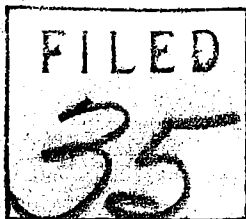
The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW:lc

COUNTY WELFARE OFFICE: Section 207.060, RSMo 1949 authorizes the county court to exercise its discretion as to whether or not county funds, services or quarters shall be contributed for support and maintenance of county welfare office; as well as amount and frequency of funds contributed. Fund contributions shall be paid to State Collector of Revenue and not to personnel of county welfare office.



April 5, 1956

Honorable Melvin E. Griffin
Prosecuting Attorney
Clinton County
Plattsburg, Missouri

Dear Mr. Griffin:

This department is in receipt of your recent request for our official opinion, and reads as follows:

"A question has arisen in my county as to whether the County Court should issue each month separate warrants in payment of each expense incurred by the local welfare office, or whether the welfare office may each month certify a list of the expenses for that month to be followed by the issuance of one warrant for all such expenses and made payable to the Welfare Office.

"In opinion No. 93-55 by General Dalton directed to Wayne W. Waldo, it was held that it was not proper to issue one monthly warrant to a county hospital superintendent or hospital board of trustees. I would like to know if this would also apply to County Welfare Offices. Your opinion on this will be appreciated."

In the second paragraph of your letter reference is made to an opinion of this department rendered to the Honorable Wayne W. Waldo, Prosecuting Attorney of Pulaski County on August 9, 1955. In said opinion it was concluded that neither a county hospital superintendent nor a hospital board of trustees may certify a list of monthly hospital expenses to the county court, and the court issue a monthly warrant to pay the hospital expenses.

As we understand it, your present inquiry is whether or not the county welfare office shall submit a monthly itemized statement to the county court, and the court shall issue its warrant to the local welfare office to cover all items shown on the statement, or

Honorable Melvin E. Griffin

must the court issue a separate warrant for each item shown on the statement to the local welfare office. You also inquire if the holding of said opinion on county hospitals would be applicable to your present inquiries.

At the outset we wish to advise you that said opinion and the conclusion reached therein has no application to and does not answer the present inquiry. This is true for the reason that there are separate and distinct statutes on county hospitals, and the State Division of Welfare, and particularly county welfare offices. The statutes on county hospitals have no relation to the operation of county welfare offices, hence the above mentioned opinion may be disregarded, insofar as your inquiry is concerned.

In an opinion of this department rendered to Honorable Edwin F. Brady, Prosecuting Attorney of Benton County, Missouri, on September 18, 1951, it was held that a county court has no obligation to furnish quarters or give support in any way to a county welfare office, but the court may, within its discretion, contribute funds, services, or quarters toward the support and maintenance of the local welfare office. A copy of that opinion is enclosed for your consideration.

Section 207.060, RSMo 1949, is in regard to the duties of the State Director of the Division of Welfare establishing a welfare office in each county of the State, and, permits political subdivisions of the State to contribute moneys, services, or quarters for the support and maintenance of county welfare offices. Said section reads as follows:

"The director of welfare shall establish a county office in every county, which shall be in the charge of a county welfare director who shall have been a resident of the state of Missouri for a period of at least five years and whose salary shall be paid from funds appropriated for the division of welfare.

"2. For the purpose of establishing and maintaining county offices, or carrying out any of the duties of the division of welfare, the director of welfare may enter into agreements with any political subdivision of this state, and as a part of such agreement, may accept moneys, services, or quarters as a contribution toward the support and maintenance of such county offices. Any funds so received shall be payable to the state collector of revenue and

Honorable Melvin E. Griffin

deposited in the proper special account in the state treasury, and become and be a part of state funds appropriated for the use of the division of welfare.

"3. Other employees in the county offices shall be employed with due regard to the population of the county, existing conditions and purpose to be accomplished, and shall be residents of the county where qualified under the regulations of the division, and shall be paid as are other employees of the division of welfare."

This section was quoted in the last above mentioned opinion, and the following comments were made in regard to same which we believe to be pertinent to our discussion:

"This statute makes it the duty of the state director of welfare to establish and maintain an office in every county in the state, and he is authorized to accept funds, services, or quarters as a contribution from any political subdivision of the state. The county is under no obligation to support the program. But the county court may in its discretion contribute moneys, services, or office space in order to assist the division of welfare in carrying on its work."

Subsection 2, Section 207.060 supra, does not provide that the county welfare office shall first file a written request each month or at any other period of time, with the county court, and that the court shall make contributions for the support of said office only after such request has been filed. It is believed that the court would be authorized to make a contribution for the support of the welfare office regardless of whether or not an itemized statement of its monthly expenses and a request that the court should order same paid were ever filed.

Said subsection 2, Section 207.060 supra, specifically provides, that for the purposes of establishing and maintaining a local welfare office, the State Director of the Division of Welfare may enter into an agreement with any political subdivision of the State, whereby the latter may contribute moneys, services, or quarters toward the support of said local welfare office. However, if the political subdivision contributes funds for such purpose they shall be paid to the State Collector of Revenue, deposited in the proper special account in the State treasury, and

Honorable Melvin E. Griffin

shall become a part of State funds appropriated for the use of the Division of Welfare.

In view of the foregoing, it is our thought that a county court is unauthorized to issue a county warrant payable to the county welfare office to cover the total amount shown on an itemized statement of the monthly expenses of the office. The court would also be unauthorized to issue a warrant to the local welfare office for each item of expense shown on said itemized statement.

It is our further thought that in the event the county court desires to contribute county funds for the benefit of the local welfare office, it is authorized to do so by the statute quoted above, and that the amount of contribution or contributions, and the frequency of making same is within the discretion of the county court. In making all such money contributions the court shall pay same to the State Collector of Revenue and not to personnel of the county welfare office.

CONCLUSION

It is therefore the opinion of this office that the provisions of Section 207.060 RSMo 1949, authorizes the county court to exercise its discretion as to whether or not county funds, services, or quarters, shall be contributed toward the support and maintenance of the county welfare office, as well as the amount and frequency of any contributions to be made. Contributions of county funds for this purpose shall be paid to the State Collector of Revenue and not to personnel of the county welfare office.

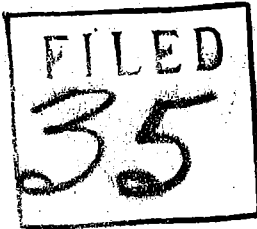
The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Yours very truly,

JOHN M. DALTON
Attorney General

PNC/ma/bi

ANIMALS:
RUNNING AT LARGE:



Criminal prosecution will lie against the owner of horses, mules, asses, cattle, hogs, sheep and goats when the owner knowingly and purposely refuses to restrain such animals from running at large and when for any reason such animals' infirmity would render valueless the law providing for the sale thereof in such townships as have voted to have the stock law applied to the above enumerated animals.

September 13, 1956

Honorable Percy W. Gullic
Prosecuting Attorney
Oregon County
Alton, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"Will you please advise whether or not criminal prosecution will lie under the terms of the statutes of the State of Missouri, pertaining to the restraint of animals running at large, the provisions of which chapter have been adopted by legal vote of the people of certain sections of our county."

On August 23 you also wrote to us as follows:

"Probably I didn't make myself clear in my original letter on this matter, so will attempt to clarify my request without going into voluminous detail, to-wit:

"The greater portion of our county has adopted the provisions of the Missouri Statutes relating to the restraint of, horses, mules, asses, cattle, hogs, sheep and goats from running at large in that portion adopting said provisions, my request is for an opinion as to whether criminal prosecution will lie under the terms of the Statutes, where a resident of the adopting section of the county willfully permits such animals belonging to him to run at large within that portion of the

Honorable Percy W. Gullie

county wherein the provisions of the stock law are applicable."

In the beginning we would point out that, of course, the provisions of the stock law would be enforceable only in those townships in your county which have voted to have the stock law and only as to those animals which had been voted upon. These, in your case, are horses, mules, asses, cattle, hogs, sheep and goats.

Your question is whether or not criminal prosecution will lie for a violation of the stock law. The only section in the stock law (Chapter 270, RSMo 1949) which provides for criminal prosecution of the owner of stock is Section 270.200, which reads as follows:

"In all counties and townships that have adopted or may hereafter adopt the provisions of this chapter, every owner or other person having the legal care of any domestic animal of the species enumerated in Section 270.010, who shall knowingly and purposely refuse to restrain the same from running at large, when its age, deformity, blindness or other infirmity would render nugatory the law providing for the sale thereof to pay costs and damages to any party who might take up said animal, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than five nor more than twenty dollars, or by imprisonment in the county jail for a term not exceeding ten days."

CONCLUSION

It is the opinion of this department that criminal prosecution will lie against the owner of horses, mules,

Honorable Percy W. Gullie

asses, cattle, hogs, sheep and goats when the owner knowingly and purposely refuses to restrain such animals from running at large and when for any reason such animals' infirmity would render valueless the law providing for the sale thereof in such townships as have voted to have the stock law applied to the above enumerated animals.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW:lc

COURT REPORTERS:
REPORTERS:

Sullivan County is required to pay its proportionate share of the expenses of the court reporter incurred in traveling to and attending court in Chariton County where such reporter does not reside in the latter county.



November 1, 1956

Honorable G. Derk Green
Circuit Judge
12th Judicial Circuit
Brookfield, Missouri

Dear Judge Green:

Reference is made to your request for an official opinion of this office which request reads, in part, as follows:

"I wish to request your official opinion on questions arising in this Circuit regarding the payment of expenses of the Court Reporter as contemplated by Section 485.090, Mo. R. S. 1955.

"The Twelfth Judicial Circuit is composed of three Counties, Linn, Chariton and Sullivan. * * * * In Linn County there are two Circuit Courts, one at Linneus, the County Seat, and one created by special legislative act at Brookfield.

"1. Is the Court Reporter living at Brookfield entitled to reimbursement for expenses while in attendance at the Court at Linneus.

"2. Is Sullivan County required to pay it's proportionate part of the expense of the Reporter living in Linn County incurred in attending court in Chariton County?* * *"

You first inquire whether the court reporter, who lives in Brookfield, is entitled to reimbursement for expenses incurred in attendance at the circuit court at Linneus in the same county.

Honorable G. Derk Green

In reply thereto, I am enclosing herewith a copy of an opinion to the Honorable Louis H. Schult, Judge of the 38th Judicial Circuit, Caruthersville, Missouri, under date of May 15, 1947, which opinion holds that the court reporter is not entitled to be reimbursed for traveling expenses incurred while traveling from his place of residence in the county to the county seat. For the purpose of this question, Section 13347, RSMo 1939, referred to in said opinion is substantially similar to Section 485.090, RSMo Cum. Supp. 1955.

Further, we do not believe that the conclusion reached in said opinion would be altered by the fact that the Legislature has authorized the holding of circuit court in more than one place in the county. Section 485.090 does not purport to allow reimbursement for expenses incurred in travel from place to place within the county and it is a fundamental rule of construction that the right of a public officer to compensation must be founded on statute and such a statute must be strictly construed against the officer. *Smith vs. Pettis County*, 136 S.W. (2d) 282, 345 Mo. 839.

You next inquire whether Sullivan County, one of the counties in the 12th Judicial Circuit, is required to pay a proportionate part of the expenses of the reporter living in Linn County incurred in attending court in Chariton County.

Section 485.090, above noted, provides that where a judicial circuit is composed of more than one county, the county part of the expenses shall be divided among the counties in the manner provided in Section 485.065, RSMo Cum. Supp. 1955. The latter section provides, in part, as follows:

"* * * Where a judicial circuit is composed of more than one county, the county part of the salary shall be divided among the counties and be paid by them proportionately as the population of such county bears to the entire population of the circuit."

These statutory provisions are, we believe, plain and unambiguous. Under such circumstances the statute must be given effect as written, *Woodside vs. Dent County*, 308 Mo. 227, 271 S.W. 766, and all technical rules of interpretation should be rejected. *Norberg vs. Montgomery*, 173 S.W. (2d) 387.

Honorable G. Derk Green

Therefore, it is the opinion of this office that Sullivan County would be required to pay proportionately as the population of such county bears to the entire population of the circuit, the authorized expenses of the court reporter in traveling to and attending court in Chariton County.

CONCLUSION

Therefore, in the premises, it is the opinion of this office that Sullivan County is required to pay its proportionate share of the expenses of the court reporter incurred in traveling to and attending court in Chariton County where such reporter does not reside in the latter county.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Donal D. Guffey.

Very truly yours,

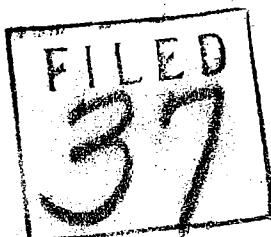
John M. Dalton
Attorney General

DDG:rw:hw

Enclosure

GENERAL ASSEMBLY: LEGISLATURE:
SPECIAL SESSION? GOVERNOR:
GOVERNOR'S CALL FOR SPECIAL
SESSION:

The Constitution prohibits action by the Legislature in Special Session on a proposed constitutional amendment, the subject of which is not included in the Governor's call for such Special Session, or in any special message of the Governor to such Special Session.



March 12, 1956

Honorable Roy Hamlin
Speaker, House of Representatives
Sixty-Eighth General Assembly
Jefferson City, Missouri

Dear Mr. Hamlin:

This will acknowledge receipt of your recent request for an official opinion of this office concerning the following matter:

"Enclosed is a copy of House Joint and Concurrent Resolution No. 1, which was introduced into the House of Representatives this morning.

"I would appreciate it if you would check this resolution with the proclamation of the Governor and give me a written opinion as to whether the House can, or should entertain this resolution at this special session under the Constitution and laws of the State of Missouri. * * *

Article IV, Section 9 of the Constitution of Missouri, 1945, provides for the calling of an extraordinary session of the General Assembly by the Governor, and requires the Governor to state specifically each matter upon which action of the General Assembly is deemed necessary. This section reads:

"The governor shall, at the commencement of each session of the general assembly, at the close of his term of office, and at such other times as he may deem necessary, give to the

Honorable Roy Hamlin

general assembly information as to the state of the government, and shall recommend to its consideration such measures as he shall deem necessary and expedient. On extraordinary occasions he may convene the general assembly by proclamation, wherein he shall state specifically each matter on which action is deemed necessary."

This provision is the same in substance, but with a slight change in language, as that found in Article V, Section 9 of the Constitution of 1875.

The Constitution further specifically limits the power of the Legislature in Special Session to the matters contained in the call of the Governor, or in any special message which the Governor may deliver. This limitation is found in Article III, Section 39 (7) where it is provided:

"The general assembly shall not have power:...

"(7) To act, when convened in extra session by the Governor, upon subjects other than those specially designated in the proclamation calling said session or recommended by special message to the general assembly after the convening of an extra session;"

It should be noted that the provisions and language of subparagraph (7) are exactly the same as Article IV, Section 55 of the Missouri Constitution of 1875.

Thus it will be seen that the Constitution requires the Governor to state specifically each matter upon which action of the General Assembly in Special Session is deemed necessary, and affirmatively withdraws from the Legislature power to act in Special Session upon subjects other than those enumerated in the Governor's call. It has been repeatedly held by the Supreme Court of Missouri that these provisions of the Constitution are mandatory, not merely directive, and that unless action of the General Assembly is in conformity therewith, such action is null and void. See *Wells v. The Missouri Pacific Railway Company*, 110 Mo. 286, 19 S.W. 530; *State ex rel. Carpenter v. City of St. Louis*, 318 Mo. 870, 2 S.W. 2d 713; and *State v. Adams*, 323 Mo. 729, 19 S.W. 2d 671.

Honorable Roy Hamlin

In the case of State ex rel. Rice v. Edwards, et al., 241 S.W. 945, the Missouri Supreme Court En Banc carefully considered the problem of action by the General Assembly in Special Session upon a subject not included in either the call of the Governor convening such Special Session, or a message from the Governor to the General Assembly in such Special Session. It is pointed out in this case that the Governor is required to specifically set out the suggestions upon which action of the General Assembly is deemed necessary, and that the General Assembly in Special Session has no power to act on subjects other than those enumerated by the Governor. In considering this matter the court said at l.c. 948:

"In other words, there are limitations upon legislative action both when the General Assembly is in regular session, and when it is in special session. When in special session its power to legislate at all is dependent upon the Governor, and when he designates the 'matter' or matters to be legislated upon, the power to legislate is limited to such matters. The General Assembly does not have to legislate upon the special matter just as the Governor may desire, or as he might indicate in an ill-advised message, but such body must confine itself to the matter submitted by the Governor. It cannot go beyond the matter submitted. Our constitutional provision on this subject is mandatory, not discretionary. Wells v. Ry. Co., 110 Mo. loc. cit. 296, 19 S.W. 530, 15 L. R. A. 847; State ex rel. v. Hitchcock, 241 Mo. loc. cit. 464 et seq., 146 S.W. 40; Denver Co. v. Moss, 50 Colo. loc. cit. 289 et seq., 115 Pac. 696.

"This, because so sayeth our Constitution. When the General Assembly steps beyond the matter specifically submitted to it by the Governor, it acts (in a special session) without constitutional warrant, and its acts are void. In this case a vital question is the 'matter' referred to the Fifty-First General Assembly by the Governor, through these written messages.* * *

Honorable Roy Hamlin

Further, in this discussion the court said:

"In discussion of the question as to whether or not the General Assembly remained within the limits of the matter or subject submitted to it for legislative action by the message of the Governor, we want to first say that we find no fault with those cases which hold that when the subject or matter is submitted to the Legislature, the Legislature is authorized to legislate upon the subject or matter in any way that it sees fit. It does not have to follow the views of the Governor, and legislate in a particular way upon the submitted subject. But this rule does not change the rule that the Governor can limit the subject-matter for consideration, and for legislative action. The matter to be legislated upon at a special session is within the discretion of the Governor. If he wants legislation upon certain matters pertaining to railroads, or their employees, he must specifically designate it, and when he has specifically designated it, the lawmakers are not permitted to ramble through the whole domain of corporation law. Their legislation must be within the narrow bounds of the subject or matter submitted. *Wells v. Ry. Co., supra.*"

Further, in reaching its conclusion the court noted:

"* * * Under our rulings, and under rulings elsewhere, the Governor can and should specifically name the matter or subject for legislative action. When he has specifically named it, all the courts hold that the Legislature cannot go beyond it. Not a case cited by respondents contravenes this rule.* * *"

In this connection see also *Stoeke v. Edwards*, 295 Mo. 402, 244 S.W. 802, where the court, following the same reasoning, reached the same result.

Thus it will be seen that the Supreme Court of Missouri has constantly held that the Governor must specifically enumerate subjects upon which he deems action necessary by the General

Honorable Roy Hamlin

Assembly in Special Session, and that under what is now Article III, Section 39 (7) of the Missouri Constitution, the Legislature in Special Session is limited in an affirmative and specific manner from acting on any subject other than those specifically designated by the call of the Governor, or by special message of the Governor. In the present case there has been no special message from the Governor and thus, the subjects upon which the Legislature in this Special Session may act must be found in the Proclamation of the Governor calling this Special Session. From an examination of this Proclamation it appears that the Governor did not include the subject dealt with by House Joint and Concurrent Resolution No. 1.

It has been suggested that since this joint resolution would, if legally enacted, submit to the people for their determination the matter of a constitutional amendment, and would not require the concurrence or signature of the Governor, that action on such matter by the General Assembly in Special Session is not prohibited by the Constitution. This suggestion is based upon a misapprehension of the constitutional provision. The Constitution does not limit its prohibition to matters of legislation or to matters which require the concurrence of the Governor. The Constitutional provision (Article III, Section 39(7)) is much broader and specifically withdraws the power of the Legislature to act on any subject except those enumerated by the Governor.

If the constitutional limitation only prohibited "legislation," then the Special Session of the General Assembly could properly act upon House Joint and Concurrent Resolution No. 1 since the Missouri Supreme Court has, in conformity with the holding in most other states, held that the proposing of constitutional amendments is not a legislative function. See *State ex inf. McKittrick ex rel. Ham v. Kirby*, 349 Mo. 988, 163 S.W. 2d 990, and cases cited therein. However, as is pointed out above, the constitutional limitation is not restricted to "legislation" but is very broad in scope.

It has also been suggested that constitutional amendments are not proposed by the General Assembly but by a majority of the members thereof, and that, therefore, the prohibition on action by the General Assembly in special session, found in Article III, Section 39 (7), is not applicable to and does not prohibit the proposing of constitutional amendments by the members of the legislature when assembled in special session, irregardless of the subjects designated by the Governor. This contention is based upon the wording of Article XII, Section 2, wherein it is provided:

"Constitutional amendments may be proposed at any time by a majority of the members elect

Honorable Roy Hamlin

of each house of the General Assembly, the vote to be taken by yeas and nays and entered on the journal.* * * (Emphasis supplied.)

A reading of this provision shows that it is not proposed that a majority of the members of each house of the General Assembly may propose a constitutional amendment regardless of any other circumstance, for it appears that the requirement that a vote be taken by yeas and nays and entered on the journal, of necessity, limits the powers to propose constitutional amendments to a time when the General Assembly is in session. It is apparent that the authorization to propose constitutional amendments "by a majority of the members elect of each house" merely determines the number of members of each house which must concur before such amendment may, in fact, be proposed. Thus, it is not a majority of the members voting or a majority of a quorum or a majority of the members present, but it is a "majority of the members elect" which constitutes the number required to propose a constitutional amendment. Therefore, this language of Article XII, Section 2, does not take from the General Assembly the power to propose constitutional amendments and vest the same in the members of each house thereof, but it merely designates the number in each house who must vote for any proposed constitutional amendment. This conclusion is buttressed by the fact that immediately following the above quoted portion of Section 2, it is provided that "All amendments proposed by the General Assembly or by the initiative shall be submitted," etc., so that it appears that it was not the intention of the framers of the Constitution that constitutional amendments should be proposed by the members of each house of the General Assembly as contradistinguished from the General Assembly itself.

Although all of the Missouri cases found on this subject dealt with statutes enacted by the General Assembly at Special Session rather than with proposed constitutional amendments, or other similar matters, it is believed that the reasoning of the cases cited require the conclusion that the Special Session of the Legislature is without power to act upon a subject such as that contained in House Joint and Concurrent Resolution No. 1, as well as upon proposed statutes.

CONCLUSION

It is, therefore, on the basis of the foregoing, the conclusion of this office that the Legislature now in Special Session,

Honorable Roy Hamlin

pursuant to the Proclamation of the Governor, is without power to act upon the subject of House Joint and Concurrent Resolution No. 1, for the reason that such subject matter was not included in the Proclamation of the Governor convening such extraordinary Session and that there has been no special message from the Governor to the General Assembly covering such subject matter.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Fred L. Howard.

Yours very truly,

John M. Dalton
Attorney General

FLH:vlw

LEGISLATURE:
LEGISLATIVE COMMITTEES:
COMMITTEES: GENERAL ASSEMBLY:
SPECIAL SESSION OF THE LEGISLATURE:
CONSTITUTIONAL LAW:

Committees may be appointed to function during Special Session of the Legislature only as to matters within the call of the Governor or any special message of the Governor. Such com-

mittee may be created by resolution of one house and expenses thereof paid in the normal manner and from the usual funds.



March 30, 1956

C. F. Jones v Atterbury
300 S.W. 2d 106

Honorable Roy Hamlin
Speaker, House of Representatives
State Capitol Building
Jefferson City, Missouri

Dear Sir:

This is in reply to your recent request for an official opinion of this office which reads:

"* * * I would appreciate it if you would also give me a written opinion as to whether or not the House of Representatives, at this special session, can consider any House resolution setting up a committee of the House to make investigations of certain matters not within the proclamation of the Governor, and whether any expenses created by such a committee could legally be paid from the contingent fund of the House or any money out of general revenue of the State.

"Further, whether or not the expense of any such House committee, even though it called for investigation of a matter within the scope of the Governor's proclamation, could legally be paid from either the House contingent fund or from any other fund out of general revenue, if such resolutions were not adopted by both the Senate and the House and signed by the Governor."

It is specifically noted that this request refers to, and this opinion pertains only to committees formed by the Legislature while in Special Session, which committees are to function

Honorable Roy Hamlin

only during such Special Session. As to any question concerning the power of such committees to function after the adjournment of such Special Session, the previous opinion of this office dated July 6, 1955, and addressed to you would be applicable.

Article III, Section 39 (7) of the Missouri Constitution of 1945 provides:

"The general assembly shall not have power:

"(7) To act, when convened in extra session by the Governor, upon subjects other than those specially designated in the proclamation calling said session or recommended by special message to the general assembly after the convening of an extra session; * * *"

It will be noted that this provision is very broad and all-inclusive. The Constitutions of many other states prohibit the Legislature in Special Session from enacting "legislation" during such Special Session on subjects other than those recommended by the Governor, whereas the above-quoted provision of the Missouri Constitution specifically takes from the Special Session of the Legislature the power to act upon subjects other than those designated by the Governor.

The powers and duties of a committee created by the Legislature, or by one house thereof, depend upon the powers of the body which creates such committee. The committee is but an arm or instrumentality of the body which creates it and cannot perform functions or exercise powers greater than those of the source from which it comes. That is, the committee cannot have greater powers than the Legislature, or the one house thereof, which creates such committee. Thus it is stated that the investigative powers of a legislative committee can only be directed to subjects legitimately within the scope of the functions, powers and duties of the Legislature itself and that it is a proper function of the committee only to secure information necessary to the proper discharge of the powers, duties and functions of the Legislature, or the one house thereof, which creates the committee. In this connection see *Ex parte Caldwell*, 61 W. Va. 49, 55 SE 910; *Tipton v. Parker*, 71 Ark. 193, 74 S.W. 298; *Greenfield v. Russel*, 292 Ill. 392, 127 NE 102; and *State v. Fluent*, 191 P. 2d 242 (Wash. Sup.)

The general rule concerning this limitation upon the power of a legislative committee is stated in 49 Am. Jur., States, Section 43, page 260, as follows:

Honorable Roy Hamlin

"Whenever the legislature has authority to enact laws, it has corresponding authority to make necessary investigations for the ascertainment of such facts as are a necessary predicate for the enactment of the law, and to this end may appoint investigating committees. This is the principal purpose and function of legislative committees. * * *"

And, in the recent case of DuBois v. Gibbons, 2 Ill. 2d 392, 118 NE 2d 295, the Supreme Court of Illinois in considering the limitation upon the legislative power of investigation by committees thereof said at l.c. 118 NE 2d 307:

"But there are limitations on the legislative power of investigation and this brings us to the crux of appellees' objection which is not that the city council of the city of Chicago is entirely lacking in the power to investigate but rather that under the particular ordinance in question a true legislative purpose is lacking, especially as indicated by the circumstances disclosed by the pleadings in this case. The basis for the legislative power to investigate lies in the necessity of the legislature obtaining adequate information in order to legislate. Since this is the basis of the power, the investigation must be for a legislative purpose. Greenfield v. Russel, 292 Ill. 392, 127 N.E. 102; Sinclair v. United States, 279 U.S. 263, 49 S. Ct. 268; McGrain v. Daugherty, 273 U.S. 135, 47 S. Ct. 319. If such purpose, either express or fairly inferable, is lacking, the investigation will not be sustained. Greenfield v. Russel, 292 Ill. 392, 127 N.E. 102. Thus, the first limitation on a legislative investigation is that it must be for a legislative purpose. * * *"

From the foregoing it would appear that the power of the Legislature to create a committee and the power of such committee to investigate is limited to a committee created for, and investigation by such committee for, the purpose of securing information necessary to the exercise of the functions, powers and duties of the Legislature, or one house thereof, which creates the committee. In Missouri by Article III,

Honorable Roy Hamlin

Section 39 (7) of the Constitution quoted hereinabove the Legislature is specifically limited, when sitting in Special Session, to action upon subjects designated by the Governor, and therefore it has no functions, powers or duties in connection with any other subjects, and it would follow that no committee can be created to investigate subjects which are not within the power of the Legislature in Special Session to act upon.

No Missouri authority has been found on this question and a considerable search has revealed only one case in the United States on the subject. This is the case of *Ex parte Walters*, decided by the Court of Criminal Appeals of Texas in 1912, and reported in 144 SW 531. Although the opinion in that case written by Presiding Judge Davidson appears to represent only the reasoning of that Judge, which was not concurred in by the other two judges, it appears to be carefully considered and is believed to be in conformity with the general principles set out hereinabove. In this case it is said at l.c. 535:

"* * * Be it remembered that this was a special, and not a regular or biennial, session of the Legislature. The scope of the authority of a special session of the Legislature is to be found in section 40 of article 3 of the Constitution, which reads as follows: 'When the Legislature shall be convened in special session, there shall be no legislation upon subjects other than those designated in the proclamation of the Governor calling such session, or presented to them by the Governor, and no such session shall be of longer duration than thirty days.'

"From this it will be observed that, when the Legislature is convened in special session, such express limitation is placed upon the power of that body that it cannot legislate upon any subject or subjects except those specially designated in the proclamation of the Governor calling the body together, or such as may be subsequently presented to that body by the Governor. This limited rule set out in the above section does not apply to the Legislature when sitting in its biennial session. It will therefore be observed there is a marked difference between the power of the Legislature in regular session as compared with its power when sitting in a special session. * * *"

Honorable Roy Hamlin

The Judge went on to further discussion of this subject and said at l.c. 535:

"The question, then, here is: What may the Legislature do at a special called session in regard to legislation, and for what purpose by concurrent resolution, or a resolution of either house, and for what purpose may either or both houses appoint committees, and what subjects may be invested by said committee? To the mind of the writer, these are answered definitely by article 3, Sec. 40. By the express terms of that section, the Legislature is expressly restricted and limited, first, to the passage only of such laws as the Governor has authorized in his proclamation, or in subsequent messages submitted by him; and, second, either or both houses may have authority to make investigations looking to the enactment of such laws as are within the proclamation or message of the Governor, but the Legislature may not and cannot investigate matters for legislative purposes not within the proclamation. Nor would the Legislature have authority to investigate matters the Governor declined to submit to it, and this proposition is intensified when the demand or request has been made upon him and he declines to accede. This, the writer understands, would be the limit of authority on the part of the Legislature to either legislate or investigate matters looking to legislation. This, as before stated, is more than intensified when the fact is taken into consideration that the Governor refused to refer or submit these matters for legislation. It is thought to be a correct statement that the Legislature either in general or special session would have no authority, either as a body or through committees, to investigate matters for legislation about which that body could not enact laws, and when they were without authority to so enact. It might be concluded as a correct proposition, so far as this case is concerned, that whenever the Legislature has authority to enact laws, it would have corresponding authority to make necessary investigations for the ascertainment of such facts as would be necessary as

Honorable Roy Hamlin

a predicate for the enactment of laws wherein the matter was then pending and formed a part of the proceedings of that body. These rules apply as well to special as to general sessions, but there must be authority in either event as a predicate for legislative action upon the subject or subjects under investigation; otherwise it could not be considered a part of the proceedings of the Legislature. If the above propositions are correct, then the special session had no authority to appoint the committee to investigate, and the committee so appointed was powerless to investigate matters about which that body could not possibly legislate or take action.

"It is true the Legislature is one of the three co-ordinate branches of the government, and in a general way has power in matters of legislation; but there is to be noted a marked difference and distinction between the scope of power of the regular session and that of a special session of the Legislature. When that body meets in its biennial session, its authority to enact laws and make investigations is as broad as is the constitutional guaranty of power, to wit, as the lawmaking department of the government. The limitation of such power is to be found in the terms of the Constitution as expressed or necessarily implied. It is not the purpose here to go into any discussion as to the limitations of express or implied power, but the rule is entirely different when the Legislature meets in special session. In the latter case they have no authority to legislate, except as set forth by the Governor in his proclamation, or in subsequent messages sent by him to that body. These propositions being correct, the Legislature was without authority to create the committee before whom applicant was called upon to testify, and the committee was without authority to propound questions to or demand answers from this applicant. * * *"

Honorable Roy Hamlin

From this authority this office concludes that the House of Representatives may not create a committee when the Legislature is convened in Special Session for the purpose of investigating subjects which have not been designated by the Governor.

Your second question asks whether or not expenses of a committee which might be created to investigate a subject within the Governor's call may be paid from public funds when such committee is not created by a resolution concurred in by both the House and Senate and signed by the Governor. Since this question pertains to a committee which will function only during the Special Session of the Legislature, such committee may, according to general law, be created by one house thereof. This general rule is stated in 49 Am. Jur., States, Sec. 41, page 258, and further citation on this point is not deemed necessary. It is there said:

"It is generally conceded that a legislative committee which is to function during the sessions of the legislature may be created either by a separate resolution of one branch of the assembly or by a concurrent resolution of both branches. Either house may appoint separate committees or the two houses acting concurrently may appoint joint committees for any proper purpose, and these committees may exercise during the sessions of the legislature such power or powers as the house or houses appointing them may lawfully delegate or impose, although only such powers can be delegated as are possessed by the house or houses making the appointment. Of course such a committee may function under a regularly passed act of the legislature or general assembly."

Therefore, since the committee now being considered may properly be created by resolution of one house the expenses thereof may be paid in the normal manner and from the usual funds.

CONCLUSION

On the basis of the foregoing it is the conclusion of this office that when sitting in Special Session neither the Legislature, nor one house thereof, may create a committee for the purpose of investigating a subject or subjects not recommended by the call or special message of the Governor, but that the Legislature, or either

Honorable Roy Hamlin

house thereof, may create a committee to investigate subjects within the call of the Governor, and that the expenses of such committee functioning during the Special Session of the Legislature may be paid out of public funds in the normal manner and from the usual sources.

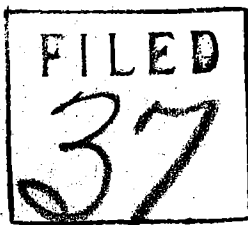
The foregoing opinion, which I hereby approve, was prepared by my assistant, Fred L. Howard.

Yours very truly,

John M. Dalton
Attorney General

FLH:vlw

ELECTIONS: The state would not be liable for the cost of conducting the election on the school foundation bill and cigarette tax in a county wherein a vacancy in the office of state representative is filled in the same election.



April 10, 1956

Honorable Everett Harris
Representative, Sullivan County
State Capitol Building
Jefferson City, Missouri

Dear Mr. Harris:

Reference is made to your recent request for an official opinion of this office, which request reads as follows:

"As you may know a vacancy existed in the office of representative from Sullivan County, and last October the Governor called the special election to fill this vacancy on the same date upon which the foundation school bill and the cigarette tax were voted upon.

"A dispute has arisen as to whether the state of Missouri should pay all of the cost and expense of such election because the same election judges and clerks at each voting precinct were used, not only on the vote taken upon the foundation school bill and the cigarette tax, but also upon the election for representative from said county."

Section 111.405, RSMo Cum. Supp. 1955, provides as follows:

"That hereafter when a question is submitted to a vote of all of the electors throughout the state, and no other question is submitted for a vote at the same election, all costs of such election shall be borne by the state, and after audit by the state comptroller, the state treasurer shall pay the amounts claimed by and due the respective political subdivisions out

Honorable Everett Harris

of any moneys appropriated by the legislature for that purpose."

Said section authorizes and directs the state to bear the cost of an election wherein a question is submitted to a vote of all the electors throughout the state and no other question is submitted for a vote at the same election.

In a recent opinion to Newton Atterbury, State Comptroller and Director of the Budget, under date of February 24, 1956, this office had occasion to consider the term "same election." It was there stated that the "same election" was one in which the same state election officials (judges and clerks) are required, under applicable statutes, to conduct the vote on the special issues. A copy of said opinion is enclosed herewith.

The same election officials would be required to conduct a special election to fill a vacancy in the office of state representative as well as the vote on the school foundation bill and the cigarette tax election if said issues were submitted on the same day. Therefore, we are of the opinion that the state would not be liable for the cost of conducting an election on the state-wide issues in your county since another issue was submitted for vote at the same election.

CONCLUSION

It is, therefore, the opinion of this office that the state would not be liable for the cost of conducting the election on the school foundation bill and cigarette tax in a county wherein a vacancy in the office of state representative is filled in the same election.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Donal D. Guffey.

Yours very truly,

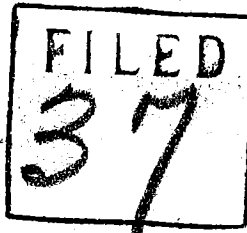
John M. Dalton
Attorney General

Enclosure(1)

DDG:mw

CHIROPODY
EXAMINATION:

It would not be lawful for the State Board of Chiropody to accept the examination of the National Board of Chiropody Examiners as a written examination given by the State Board and in lieu of such an examination by the State Board.



June 27, 1956

Honorable L. A. Hansen, D.S.C.
Secretary, Missouri State Board of Chiropody
800 Professional Building
Kansas City, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"As Secretary of the Missouri State Board of Chiropody, I should like to get an official opinion from your office.

"Would it be lawful for this Board to accept the examination of the National Board of Chiropody Examiners as a written examination given by this Board? This examination would have to be equal to or superior to the written examination given by this Board. We would still have the applicant to fill out the regular application form, pay the examination fee, and take the practical examination that is given by this Board."

Section 330.030, Missouri Revised Statutes Cumulative Supplement 1955, reads as follows:

"Any person desiring to practice chiropody in this state, shall furnish the state board of chiropody with satisfactory proof that he or she is twenty-one years of age or over, and of good moral character, and a citizen of the United States, and that he or she has received at least four years of high school training, or the equivalent thereof, as determined by the board, and has received a diploma or certificate of graduation from a reputable school of chiropody conferring the degree of D. S. C. (doctor of surgical chiropody) and recognized and approved by the state board of

Honorable L. A. Hansen, D.S.C.

chiroprody, having a minimum requirement of one year in an accredited college and four years in a recognised and reputable chiroprody college. Upon payment of a fee of thirty-five dollars to the director of revenue, and making satisfactory proof as aforesaid, the applicant shall be examined by the state board of chiroprody, or a committee thereof, under such rules and regulations as said board may determine, and if found qualified, shall be licensed to practice chiroprody as registered, and shall receive in testimony thereof a certificate signed by the president and secretary of the board; provided, that the state board of chiroprody may under regulations established by the board, admit without examination legally qualified practitioners of chiroprody who hold certificates to practice chiroprody in any state or territory of the United States or the District of Columbia with equal educational requirements to the state of Missouri and that extend like privileges to legally qualified practitioners from this state upon the applicant paying to the division of collection a fee of one hundred dollars."

Section 330.040, RSMo 1949, reads as follows:

"Examinations shall be in the English language, and shall be written, oral or clinical, or a combination of two or more of the said methods as the board may determine. The examination shall embrace the subjects of anatomy, physiology, chemistry, bacteriology, histology, pathology diagnosis and treatment, materia medica and therapeutics as these subjects relate to antiseptics and anaesthetics, and clinical chiroprody, but said examinations shall be so limited in their scope as to cover only the minimum requirements for chiroprody educations as herein provided,

Honorable L. A. Hansen, D.S.C.

and shall not be construed to require of the applicant a medical or surgical education other than deemed necessary for the practice of chiropody. The minimum requirements for registration of applicants shall be based on a general average of seventy-five per cent of the subjects involved, and not less than sixty per cent in any one subject."

We do not see anything in the above which would permit the board of examiners to deviate from the requirements as laid down by the statutes and we do believe that the acceptance of the examination of the National Board of Chiropody Examiners would be such a deviation.

CONCLUSION

It is the conclusion of this department that it would not be lawful for the State Board of Chiropody to accept the examination of the National Board of Chiropody Examiners as a written examination given by the State Board and in lieu of such an examination by the State Board.

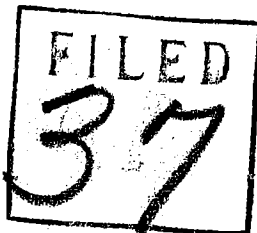
The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours

John M. Dalton
Attorney General

HPW:lc

APPROPRIATIONS: Section 13850 of House Bill 588 of the 68th
General Assembly appropriates funds chargeable
MISSOURI STATE to Post War Reserve Fund to Missouri State
PENITENTIARY: Penitentiary for making additions, repairs and
replacements, for constructing and equipping
industrial buildings. Appropriation can only
be used for purposes authorized, no part of same
can be used to erect a barn on State Church Farm.



September 21, 1956

Honorable C. R. Hardy, Auditor
Missouri State Penitentiary
Box 900
Jefferson City, Missouri

Dear Mr. Hardy:

This department is in receipt of your recent request for
our legal opinion reading as follows:

"The Sixty-eighth General Assembly, by House
Bill No. 588, Section 13.850, appropriated
the sum of \$1,500,000.00 from the Post War
Reserve Fund for the use of the Missouri State
Penitentiary for Additions, Repairs and Re-
placements: 'For constructing and Equipping
Industrial Buildings'.

* * * *

"Fire destroyed a large feed barn on the State
Church Farm, which contained feed for the
dairy, on the 1st of this month. Replacement
of the barn is very necessary and a barn is
badly needed at the Algoa dairy, which is now
operated under the Division of Farms.

"An opinion as to the legal use of funds ap-
propriated under House Bill No. 588, Section
13.850, to replace the dairy barn is requested;
also, an opinion as to a barn for the Inter-
mediate Reformatory dairy. Due to the urgency,
your earliest possible consideration shall be
appreciated."

Honorable G. R. Hardy, Auditor

Reference is made in the opinion request to Section 13850 of House Bill No. 588 of the 68th General Assembly, which appropriates \$1,500,000.00 to the Missouri State Penitentiary, and reads as follows:

"There is hereby appropriated out of the State Treasury, chargeable to the Post War Reserve Fund, the sum of One Million Five Hundred Thousand Dollars (\$1,500,000.00), for the use of the Missouri State Penitentiary for Additions, Repairs and Replacements, for the period beginning July 1, 1955 and ending June 30, 1957, as follows:

Additions, Repairs and Replacements:

"For constructing and equipping industrial buildings \$1,500,000.00"

The first inquiry is whether or not a portion of the funds appropriated to the penitentiary by this section may be used to replace a barn recently destroyed by fire on the prison farm, known as the State Church Farm.

The second inquiry is whether a portion of the funds thus appropriated may be used to erect a barn at the dairy of the Intermediate Reformatory.

While there are many primary rules for the construction of statutes, it is believed to be sufficient for our present purpose to call attention to only three and follow them in construing Section 13850. The first rule has been given in the case of *Fugh v. St. Louis Police Relief Ass'n.*, 179 SW2d 927, at l.c. 934, as follows:

"In construing said statutes the court must be guided by the primary rule of statutory construction, which is to ascertain and give effect to the intention of the lawmakers from the words used in the statutes and to adopt that sense which harmonizes best with the context thereof and promotes in the fullest measure the apparent policy and objects of the Legislature. State ex rel. Lentine v. State Board of Health, 334 Mo.

Honorable C. R. Hardy, Auditor

220, 65 S.W.2d 943. See also, Sutherland on Statutory Construction, 2d Ed., Vol. 2, Section 363."

The second rule has been given in the case of State v. Hawk, 228 SW2d 785, at l.c. 788, as follows:

"* * * It is fundamental that in interpreting Sec. 10484, supra, our primary purpose is to ascertain and give effect to the intention of the Legislature. If possible, the statutory intent should be determined from the words which have been used 'considering the language honestly and faithfully to ascertain its plain and rational meaning and to promote its object and manifest purpose.' * * * Since no technical language is employed in the statute, the words used 'will be construed in their ordinary sense and with the meaning commonly attributed to them, unless such construction will defeat the manifest intent of the Legislature.' * * *"

With these rules in mind we turn to Section 13850, supra, in an effort to determine the exact meaning intended to be given said section. In doing so, some questions are presented for consideration, such as: In making said appropriation was it the legislative intent that such amount was to be used generally for making additions, repairs and replacements of all buildings, and for constructing and equipping industrial buildings of the Missouri State Penitentiary, or was it the legislative intent that the appropriation was to be restricted and used only for making additions, repairs and replacements to industrial buildings, and for constructing and equipping such buildings of the penitentiary?

In this connection we call attention to the third rule of statutory construction referred to above, namely, that the express mention of one person, place or thing in a statute implies the exclusion of all others, and was discussed in the case of City of Hannibal v. Minor, 224 SW2d 598, at l.c. 605:

"* * * There is a fundamental principle of construction which has been recognized and applied from time immemorial by our courts to such questions as we have here. It is embodied in the maxim: 'Expressio unius est exclusio

Honorable C. R. Hardy, Auditor

alterius' which means that the express mention of one thing, person or place implies the exclusion of another. The application of this principle to the question before us merely serves to emphasize the fact that the City in this case was without authority to include in its ordinance 'automobile repair shops.'

Applying the principles laid down in the rules of construction previously mentioned, particularly the last one, to Section 13850, supra, in order to determine the legislative intent, it appears that if funds were intended for making additions, repairs and replacements of all buildings, as well as for constructing industrial buildings at the penitentiary, then such intent would have been more clearly expressed and would not have been left to conjecture or speculation, as would be true if such a construction were placed on the section.

It is noted that express mention is made of only one type or class of penitentiary buildings, namely, industrial buildings. Under the principles of the third rule of construction, it appears the context in which the terms are used indicates that any and all other types of penitentiary buildings are to be excluded therefrom. Therefore, the more reasonable construction, and the one more nearly in conformity with the apparent intent and purpose of the lawmakers, is that the act appropriates \$1,500,000.00 for the purpose of making additions, repairs and replacements to industrial buildings and for constructing and equipping industrial buildings of the penitentiary. No portion of such funds could be used for erecting a barn on the Church Farm, unless a barn could be classified as an industrial building within the meaning of the act, in which event such an expenditure from the appropriation could be legally made.

Since there is no indication that the words of the section were intended to be used in a technical sense, it is assumed that they have been used in their plain or ordinary sense.

While the words "industry" or "industrial" have not been used by themselves in the section, but in order to fully understand the words "industrial buildings" it is believed necessary to refer to them and their meanings.

The word "industry" is defined as any department or branch of art, occupation or business, especially one which employs much labor and capital and is a distinct branch of trade.

Honorable C. R. Hardy, Auditor

The word "industrial" relates to manufacture or to the products of industry or labor.

We are unable to find any Missouri statute or court decision defining the term "industrial buildings." However, in the case of *Holly v. City of Elizabethton*, 241 SW2d 1001, said term was defined at l.c. 1003 as follows:

"[1] The statute defines an 'industrial building' to be a factory, mill, processing or fabricating plant. In as much as four walls, floors and roof cannot accurately be termed 'an industrial building', it follows that 'an industrial building' within the reasonable meaning of the Act is a building with such fixtures, machinery, etc. attached to, and becoming a part of, the building as will create a building that is equipped for the conduct of a manufacturing, milling, processing or fabricating business."

From this definition it appears that an industrial building, together with the attached fixtures and equipment, is a building to be used for the purpose of conducting some form of manufacturing or industrial business therein, and it implies that both capital and labor are to be employed in any of the activities which may be conducted in such building.

Would the word "barn" in its ordinary sense be considered an industrial building in the light of the definition given above?

Webster's New International Dictionary, 2d Ed., gives this definition of the word:

"Barn. A covered building used chiefly for storing grain, hay, and other farm products. In the United States a part of the barn is often used for stables, styes, etc."

It is readily seen that a barn is a building in which various kinds of farm products are stored and in which animals may be kept. No manufacturing or other industrial activities of any kind are carried on therein, and it is not a place where capital and labor are employed; consequently, the word "barn" cannot be classified as an industrial building.

Honorable C. R. Hardy, Auditor

In view of the fact that the words of the section specifically authorize the appropriation to be used only for the purpose of making additions, repairs, replacements, and constructing and equipping industrial buildings, the term "industrial buildings," as used herein, does not include barns, and it is our thought that no portion of such appropriation can be used to replace a barn destroyed by fire on the State Church Farm.

An opinion of this department written for Colonel James D. Garter, Director of the Department of Corrections, on November 29, 1955, construed Section 13850 of House Bill 588, referred to above. It was concluded in said opinion that no part of the funds appropriated for the state penitentiary by said bill could be used to purchase equipment for the Intermediate Reformatory. It is believed the opinion fully answers your second inquiry, and a copy of same is enclosed for your consideration.

CONCLUSION.

It is, therefore, the opinion of this department that, under the provisions of Section 13850 of House Bill No. 588 of the 68th General Assembly, funds are appropriated and chargeable to the Post War Reserve Fund for use of the Missouri State Penitentiary in making additions, repairs, replacements, and for constructing and equipping industrial buildings. Said appropriation can be used only for the purposes authorized and no part of same can be used to erect a barn on the State Church Farm.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Paul N. Chitwood.

Yours very truly,

John M. Dalton
Attorney General

PNC:sm
Enc. (1)

WORKMEN'S COMPENSATION:
STATE IS AN EMPLOYER:
EXEMPTED EMPLOYMENTS:
DEPARTMENT OF CORRECTIONS:

Legislative action necessary to give Department of Corrections authority to accept Missouri's Workmen's Compensation Law. Director of Department of Corrections, and Department of Corrections, which were created by the legislature, have no authority to accept Missouri's Workmen's Compensation Law.

October 19, 1956



Honorable Edward E. Haynes
Personnel Officer
Department of Corrections
Jefferson City, Missouri

Dear Mr. Haynes:

This is in answer to your request for an official opinion from this office. Your letter reads as follows:

"The Department of Corrections is very desirous of extending Workmen's Compensation coverage to our employees. R.S. Mo. 287.090 exempts certain employments from this coverage. The State is listed as one of the exemptions. Paragraph 2 of this section provides that an exempt employer 'may bring himself within the provisions of this chapter by filing with the commission notice of his election to accept the same.'

"It would appear from the above that a notice to the Division of Workmen's Compensation of our desire for such coverage would be sufficient. However, workmen's compensation coverage was extended to employees of the Highway Commission and Highway Patrol by legislative action, R.S. Mo. 226.160 and 226.170. Senate Bill No. 178, Sixty Eighth General Assembly, provided for the extension of the workmen's compensation law to include employees of the Department of Corrections. It was truly agreed to and finally passed by the General Assembly but was vetoed by the Governor because of budgetary reasons.

"Will you please render a decision at your earliest convenience as to whether or not legislative action is necessary before our employees may be covered by workmen's compensation?"

Honorable Edward E. Haynes

The answer to your question is that legislative action is necessary before the employees of the Department of Corrections (hereinafter referred to as the Department) may be covered by the Missouri Workmen's Compensation Law (hereinafter referred to as the Law).

The Department is part of the executive branch of our state government, and was authorized by Art. IV, Section 12, Missouri Constitution, 1945. In pursuance of this constitutional provision, the legislature created and set up the Department in 1945. Laws of Missouri, 1945, p. 723. This law, setting up the Department, was amended, Laws of Missouri, 1955, p. 318, and it is now set out in Chapter 216, Mo. Cum. Supp. 1955.

This Department is exempted from the operation of the Law. It is an employment by the state, and Section 287.090, RSMo. 1949, exempts employments by the state. That section reads as follows:

"1. Sections 287.050 to 287.080 and 287.120 of this chapter shall not apply to any of the following employments:

"(1) Employments by the state, county municipal corporation, township, school or road, drainage, swamp and levee districts, or school board, board of education, regents, curators, managers, or control commission, board or any other political subdivisions, corporation or quasi corporation thereof;

"(2) Employments of farm labor and domestic servants including family chauffeurs;

"(3) Employments which are but casual or not incidental to the operation of the usual business of the employer;

"(4) Employments in which articles and materials are given out to be made up, cleaned, washed, altered, ornamented, finished, repaired, or adapted for sale in the home of the employee, or on premises not under the control or management of the employer;

"(5) Employments by minor employers not determined to be engaged in an occupation hazardous to employees.

"2. Any employer in this section exempted from the operation of sections 287.050 to 287.080 and 287.120 of this chapter may bring himself within the provisions of this chapter by filing with the commission notice of his

Honorable Edward E. Haynes

election to accept the same, and by keeping posted in a conspicuous place on his premises a notice thereof to be furnished by the commission, and any employee entering the services of such employer and any employee remaining in such service thirty days after the posting of such notice shall be conclusively presumed to have elected to accept this chapter unless he shall have filed with the commission and his employer a written notice that he elects to reject this chapter."

However, the second part of this section, supra, gives exempted employers the right to elect to accept the law for the benefit of their employees. If we turn to the definition section, which is Section 287.030, RSMo. 1949, it defines the state as an employer. That section reads as follows:

"The word 'employer' as used in this chapter shall be construed to mean:

"(1) Every person, partnership, association, corporation, trustee, receiver, the legal representatives of a deceased employer, and every other person, including any person or corporation operating a railroad and any public service corporation, using the service of another for pay;

"(2) The state, county, municipal corporation, township, school or road, drainage, swamp and levee districts, or school boards, board of education, regents, curators, managers or control commission, board or any other political subdivision, corporation, or quasi corporation, or cities under special charter, or under the commission form of government, which elects to accept this chapter by law or ordinance.

"(3) Any reference to the employer shall also include his insurer."

Since the state is defined as an employer, it can elect to accept the Law as provided in Section 287.090, supra. But the problem is whether something must be done before the state can make such an election. To answer this query properly, it is absolutely necessary that Section 287.090, supra, be read in conjunction with Section 287.030, supra. When this is done, we note that in Section 287.030, supra, the state is defined as an employer only "which elects to accept this chapter by law * * *."

Honorable Edward E. Haynes

Therefore, the state must comply with a condition precedent before it can be properly defined an employer, and the condition precedent is that the legislature must give the state the authority to elect to accept the Law. This is the only reasonable construction to be put upon this section (287.030, supra) of the statute.

Thus, the state (the employer), by an act of its legislature, can give the Department, a new exempt employment by the state, the authority to elect to accept the Law for the benefit of its employees. That this is the intention of the legislature, can be shown by citing two laws of that body. Both laws were mentioned in your letter requesting an opinion.

In 1945, the General Assembly passed a law extending the Law to the employees of the State Highway Commission and the employees of the State Highway Patrol. Section 226.160 and 226.170, RSMo. 1949. The Highway Department is also a part of the executive branch of our government, and was created by Art. IV, Section 12, Missouri Constitution, 1945. Prior to the law, supra, it was also an exempted employment by the state. Section 287.090, supra.

Also in 1945, the General Assembly passed a law extending the Law to the employees of the Department. However, the Governor vetoed it because of budgetary reasons. Senate Bill No. 178. As mentioned supra, the Department, a part of the executive branch of our government, was created by the legislature in pursuance of the constitutional provision, supra. It is also, as mentioned supra, an exempted employment by the state.

In regards to this proposition, we cite Larson, an outstanding authority on Workmen's Compensation Law, who says, "Missouri excludes public employees unless they are brought under the act by a law or ordinance of the political subdivision." Larson, Workmen's Compensation Law, Vol. 1, page 817.

To further buttress the proposition that legislative action is necessary to authorize the Department to elect to accept the Law, it is pertinent to call attention to the fact that the Department, as mentioned, supra, is a creature of the legislature, and Section 216.110, RSMo. 1949, provides that the chief administrative officer of the Department shall be the Director of the Department. What the Department and the Director have authority to do is set out in detail in Chapter 216, supra. That chapter does not authorize either to elect to accept the Law.

In 67 C.J.S. at page 365, it is stated that, "The powers and authority of public officers are usually fixed and determined by the law," and at page 371, it further states that, "Powers con-

Honorable Edward E. Haynes

ferred on a public officer can be exercised only in the manner, and under the circumstances, prescribed by law, and any attempted exercise thereof in any other manner or under different circumstances is a nullity." And as stated in State v. Cantley, 52 S.W. 2d 397, 398 (1), applicable to our problem here although the facts are different, "The functions of the finance commissioner, like any other official, are limited to the powers and duties imposed upon him by the statute which creates the office."

CONCLUSION

Therefore, it is the opinion of this office that Sections 287.030 and 287.090, supra, require legislative action to give the Department of Corrections, a now exempted employment by the state, the authority to elect to accept the provisions of the Missouri Workmen's Compensation Law for the benefit of its employees.

Furthermore, Chapter 216, supra, setting out the powers and duties of the Director of the Department of Corrections and the Department of Corrections, does not give either the authority to elect to accept the Missouri Workmen's Compensation Law.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, George E. Schaaf.

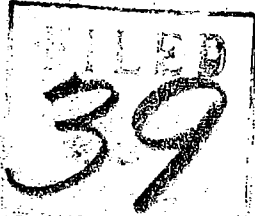
Yours very truly,

JOHN M. DALTON
Attorney General

GES/b1

PROBATE COURT:
DESIGNATION OF
SESSIONS IN
COURT RECORDS:
SHERIFF'S FEES:
POSTAGE FEES:

A session of non-regular session during a term is not a session in vacation; sheriff is entitled to fees only on days court is in session. Letters testamentary may be granted even though the court is not in session. Fees for mailing notices are to be remitted to the state. Collections made for postage actually expended may be retained by the county.



February 14, 1956

Honorable William J. Hensley
Prosecuting Attorney
Johnson County
Warrensburg, Missouri

Dear Sir:

Your November 30 request for an opinion reads as follows:

"The following questions have arisen in the mind of John H. Mittendorf, Probate Judge of Johnson County, and after discussing same with me he suggests that your opinion be obtained in the immediate future.

"I am at this time therefore requesting that you give us your opinion as regards the following matters, all involved with the new probate code and in the event that you have received requests for similar opinions, it is my suggestion that these questions be merely combined with the other questions which possibly have been propounded to you for your opinion.

"1. Section 472.050 provides that the Court shall be open at all reasonable hours and that the court may provide for the holding of sessions. Since the code makes no mention of terms of court or of acts to be performed in vacation, where the court is in session only one or two days per week, do the records of the court show that acts performed on any other day are in vacation? If not shown as performed in vacation, what is the proper designation in court records of the days that court

Honorable William J. Hensley

is not in session? Since under the provisions of Section 57.280 the sheriff receives \$3.00 per day for attending each court of record, is this sum computed on the number of days that court is open for the transaction of probate business or on the number of days that court is in session?

"2. Section 472.070 provides that the clerk may hear and determine matters not contested. When the clerk enters a judgment pursuant to this section, is such day considered and shown on court records as a day when the court was in session? If not, what designation is given to such days in the court records?

"3. Section 473.023 provides that the probate court or the clerk thereof shall grant letters testamentary or administration. May this act be performed only on those days when court is in session? If not, what designation is given to those days in court records when letters are granted by the judge or by the clerk and court is not in session?

"4. Section 483.582 provides that postage charges of serving notices shall be charged to the estate. Is this sum, when collected, remitted to the Director of Revenue with other probate fees or is it returned to the county which advanced the postage charges originally?

"Please give this your considered judgment and advise this office at your earliest convenience as to your opinion as regards the above questions."

Honorable William H. Hensley

It is correct that the 1955 Code makes no mention of terms, since the provisions of Section 481.030, RSMo 1949, have been repealed. Although "the court may by rule provide for the holding of sessions of court at the regular recurring times for the purpose of hearing claims, settlements and other matters," you will note that "No such rule shall prohibit the hearing and determination of any proceeding before the court at any time when necessary to promote the ends of justice." Therefore, at any time the court hears a matter it is in session whether or not it be on a day other than one set aside by rule for "the holding of sessions * * * at regular recurring times * * *."

It is true that the term "session" normally means that period when the court is sitting for the transaction of business during a term. However, since there are no terms there can be no "vacation."

"Vacation" has been held to mean the period between terms and not the mere interval during a term when it is not in session. See Warner v. Donahue, 99 Mo. App. 37, 1. c. 44, 72 S.W. 492 and cases cited. Consequently, the court records should not show that the court sat during vacation merely because court was held on some day other than the ones set aside for the "regular" sessions.

It is suggested that the records merely show that the court was "in session."

On your question regarding Section 57.280, it is suggested that the sheriff cannot "attend court" if no session is held. The mere statement that "the court shall be open for business," merely means that the office shall be open. The court might very well not be sitting as a "court." The sheriff's attendance might not be requested. The sheriff is entitled to \$3.00 for attending court, as provided for in Section 57.280, only when the court is in session, and then only when requested by the judge. See, in this regard, the attached opinion to Honorable John A. Eversole, Prosecuting Attorney, Washington County, dated January 3, 1947.

Turning to the question in the paragraph you have labeled

Honorable William J. Hensley

No. 2, it is noted that the powers of the clerk, enumerated in paragraphs 1 and 2 of Section 472.070, V.A.M.S., 1955, are ones that may be performed at any time. Paragraph No. 3, besides providing "that the clerk may hear and determine matters not contested" as you mention, also provides that if the judge permits the clerk's records, decrees or judgments to stand they shall "have the same effect as if made by the judge." In effect, then, the clerk sits for the judge when he hears and determines matters. When he so sits it may be considered that court is in session. The "designation given to such days in the court records" could be the same as suggested in our answer to the same question raised in your paragraph No. 1.

Your first question in paragraph No. 3, regarding the granting of letters testamentary or of administration, is "May this act be performed only on those days when the court is in session?" In our opinion, the court's authority is not limited to such days. It is suggested, however, that, if notwithstanding our opinion, the court feels compelled to make some insertion that it show only that the court was "in session." It certainly does not have to show "in regular session" and, as mentioned above, should not show "in vacation."

In answer to your question in paragraph No. 4, we note that you speak of "postage charges," as mentioned in paragraph 2 of Section 483.582, but also speak of "other probate fees" as though the postage charges might be called fees. We do not believe that they are one and the same. As to the fees provided for in paragraph 1 of Section 483.582, in the opinion of this office the fees should be accounted for and remitted to the department of revenue the same as all fees provided for in Section 483.580, and under the same provisions regarding accounting and remitting as are contained in that section. However, in our opinion, the postage charges as mentioned in paragraph 2 of 483.582 are not fees in the same sense as are those provided for in paragraph 1 of this section and in Section 483.580. It will be noticed that fee charges are made for services performed. The postage charge is not made for service performed, but is made for the purpose of obtaining reimbursement from the estate of expenditures

Honorable William J. Hensley

actually made from county funds. Nowhere do the statutes provide for division of fees collected by the state and the county, but since the amount collected from the estate for postage charges incurred by the clerk is not a fee and, since the statute is silent on the disposition of such postage charges, we think the same should be retained in the county which expends its own funds in the first instance.

CONCLUSION

In the opinion of this office the probate court records for sessions other than those set aside for regular sessions should show only that the court was "in session," and should not show that the court acted in "vacation"; that a sheriff is entitled to fees for attending court only on the days court is in session and when requested by the court; that the probate court may be "in session" when the clerk sits for the judge; that the court or clerk may grant letters testamentary without being "in session"; that the fees collected pursuant to paragraph 1 of Section 483.582, V.A.M.S., 1955, should be remitted to the department of revenue; that the postage charges collected pursuant to the provisions of paragraph 2 of Section 483.582 should be retained by the county.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Russell S. Noblet.

Very truly yours

John M. Dalton
Attorney General

RSN:lc

1 enclosure

CITIES: TOWNS: VILLAGES:
PETITION FOR INCORPORATION:
SIGNATURE:
WITHDRAWAL OF SIGNATURES:

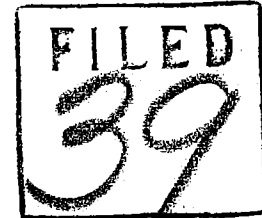
(1) Under Section 80.020, RSMo 1949, a taxable inhabitant who may petition for the incorporation of a town is one who has attained his majority and owns property located within the boundary of the proposed

town which is subject to taxation. (2) The county court must be satisfied that a village or town actually exists and that the lands included therein have a reasonable relation to such village for a petition for incorporation to be reasonable. (3) Those who have signed a petition for incorporation may withdraw their signatures at any time before hearing is held by the county court to determine if the petition bears the signature of a sufficient number of qualified inhabitants.

*Age should now be 18 (or emancipated)
because of Sec 431.055 - voting rights.*

February 27, 1956

Honorable William J. Hensley
Prosecuting Attorney
Johnson County
Warrensburg, Missouri



Dear Mr. Hensley:

This is in response to your recent request for an official opinion of this office concerning the following matters:

"As indicated to you last week by telephone, the County Court of Johnson County, Missouri, has been petitioned under Chapter 80.020 Missouri Revised Statutes 1949, for the incorporation of a town or village immediately south of and adjacent to the south city limits of Warrensburg, Missouri. Said town or village to be known as South Warrensburg, Missouri. The petition appears to comply with the statute in that all matters prescribed by statute are alleged and the petition alleges that there are 150 taxable inhabitants in said area and of that 105 or 106 signatures are attached to the petition.

"Immediately prior to the filing of the petition two individuals struck their names from the petition. After the filing of the petition some twenty-one signers on the petition desired to remove their names therefrom. As yet the County Court of Johnson County, Missouri, has not permitted any individuals to remove their names from the petition after the filing of said petition and since the filing date of the petition the hearing thereon has been continued twice and was continued from last Monday until December 5, 1955.

Honorable William J. Hensley

"The County Court has requested this office to obtain from you your opinion as to the interpretation of statute 80.020 Missouri Revised Statutes 1949, with particular emphasis upon the following questions:

"1. What is the definition of taxable inhabitants?

"2. What is the proper interpretation of the phrase in the statute as follows: 'That the prayer of such petition is reasonable.'?

"3. Would it be proper after the filing date of this petition with the County Court to permit for valid reasons the withdrawal of any of the names from the original petition?* *"

We will attempt to answer your questions in the order asked. Your first question is as to the definition of "taxable inhabitants" as used in Section 80.020, RSMo 1949. No Missouri case has been found setting out an explicable definition of the phrase "taxable inhabitant." However, at an earlier date the statute which is now Section 80.020, contained an apparent conflict in that it first required the petition for incorporation to be signed by two-thirds of the "inhabitants" of the proposed town, and then required the court to find if such petition bore the signatures of two-thirds of the "taxable inhabitants." In reconciling this apparent conflict the courts determined that it would be unreasonable to require the signature of two-thirds of the "inhabitants" because any normal community would contain over fifty per cent women and children who were not "sui juris." It was therefore concluded that "taxable inhabitants" was the controlling requirement in the statute and by inference from these cases it appears that children were to be excluded, and at that time likewise women. However, since the emancipation of women it is submitted that no distinction on account of sex should be made at the present time in determining who is, or is not, a "taxable inhabitant." In reaching this conclusion the court in the case of State ex rel. Lee v. Jenkins, 25 Mo. App. 484 said at l.c. 488:

"* * * Such an interpretation would, in nine cases out of ten, render the law impossible of execution. It is not unreasonable to suppose that in many, if not a majority, of Missouri towns and villages, at least one-half the population consists of women and children.

Honorable William J. Hensley

It would, therefore, be impossible for two thirds of the whole number to sign a petition, without including many who are not sui juris. The absurdity of the interpretation appears also in other considerations. * * *

In the later case of State ex rel. Coyne v. Buerman, 186 Mo. App. 691, the court again pointed out, l.c. 698:

"It can hardly be intended that children, minors, are to be counted, although they are inhabitants."

From these cases it would appear that the courts have used a definition of "taxable inhabitant" as one who is "sui juris" and who owns taxable property within the limits of the proposed town. Thus, at the present time children would be excluded, but men and women who have obtained their majority, and own such taxable property within the limits of such proposed town would be "taxable inhabitants." This definition is in accord with cases in other states as is found in In re Annexation of Chester Tp. 174 Pa. 177, 34 A. 457; Elkin v. Deshler, 25 N.J.L. (1 Dutch.) 177; Howe v. Town of Ware, 330 Mass. 487, 115 N.E. (2d) 455; In re Annexation of Allison Tp., 4 Lycoming 84, found in 41 Words and Phrases, Permanent Edition, under the heading "Taxable Inhabitant."

Your second question asks the proper interpretation of the phrase contained in Section 80.020 "that the prayer of such petition is reasonable." It should be noted that the courts require that a town or village actually exist before the county court may decree its incorporation. The incorporation of primarily rural, agricultural lands is not authorized by the statutes, and the inclusion of a great amount of such lands in the incorporation of a small urban area has likewise been disapproved. See the discussion of these matters in State ex inf. Rosenberg v. Town of Bellflower, 129 Mo. App. 138, 108 S.W. 117; White v. Small, 131 Mo. App. 470, 109 S.W. 1079 and State ex rel. Patterson v. McReynolds, 61 Mo. 203. In considering the matter of whether or not the petition is reasonable and what is required to satisfy the court of such reasonableness see State ex inf. McKittrick ex rel. Oehler, v. Church (Mo. App.) 158 S.W. (2d) 215, l.c. 220, where the court said:

Honorable William J. Hensley

"The decisions do hold that when the County Court, in its order of incorporation, includes territory not urban in character and with no natural connection or unity of interest with that part subject to incorporation, the whole order is void and may be attacked in a quo warranto proceeding. State ex rel. White v. Small, 131 Mo. App. 470, 109 S.W. 1079; State ex inf. Rosenberger v. Bellflower, 129 Mo. App. 138, 108 S.W. 117. Therefore, if no part of the community was urban in character, that is, if it was not a village within the meaning of the statute, the County Court had no jurisdiction and an information in quo warranto would lie to test the validity of the order."

And the court also concluded at l.c. 221:

"* * * There is no provision for any particular kind of hearing, nor is there any requirement that witnesses be sworn and their testimony taken. All that is required is that the court be 'satisfied' that the required number of qualified persons have signed the petition and that the same is reasonable."

This question is further discussed in State ex inf. Wallach, ex rel. H. B. Deal & Co. Inc. v. Stanwood (Mo. App.) 208 S.W. 2d 291, l.c. 295, where the court said:

"* * * A village is any small group or assemblage of houses in the country which are used for dwelling or business or both, even though they are not situated on regularly laid-out streets. It was so held in the Oehler case above cited, which further held that this court could not control the discretion vested by statute in the county courts absent a grave abuse of such discretion. It must be ruled that the village did exist."

Thus it would appear that where a village does in fact exist and the land contained within the proposed boundaries of the proposed town is of a character primarily useful for village or urban

Honorable William J. Hensley

purposes rather than being primarily or exclusively used or useful for agricultural purposes, and where the court is reasonably satisfied that such is the case, the court may properly, in the exercise of its discretion, order the incorporation upon proper petition. It should be emphasized that the matters discussed above in nowise limit the considerations that may determine the conclusion of the court, for many other things would, under a given set of circumstances, enter into and weigh heavy upon the exercise of the court's discretion.

The third question which you ask is whether or not one who signs a petition for incorporation of a town under Section 80.020 may be permitted to withdraw his signature after such petition has been filed with the county court. It is believed that this question is answered by a previous opinion of this office dated October 14, 1938 to Mr. E. Jay Rice, Presiding Judge of the Texas County Court, copy of which is enclosed herewith, which holds that such signatures may be withdrawn up to but not after the time when the county court makes its determination as to the sufficiency of the number of qualified signers of the petition.

CONCLUSION

It is, therefore, on the basis of the foregoing, the conclusion of this office that:

(1) Under Section 80.020, a taxable inhabitant is a person twenty-one years of age or over, who owns taxable property within the limits of the proposed town.

(2) That a petition is reasonable when it proposes the incorporation of a town which actually exists as a community of inhabitants, and which does not include large amounts of land not used or useable for urban purposes.

(3) That it is proper to allow one signing a petition for incorporation to withdraw his signature therefrom up to the time the county court holds its hearing on the question of the sufficiency of such signatures, but that such withdrawal cannot take place thereafter.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Fred L. Howard.

Yours very truly,

Enclosure - E. Jay Rice
10-14-38

John M. Dalton
Attorney General

FLH:vlw

MOTOR VEHICLES:

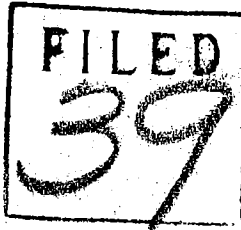
DRIVER'S RESPONSIBILITY LAW:

COUNTIES:

BONDS:

County court may not deposit county funds as security for county employee to retain his driving license.

April 24, 1956



Honorable Rex A. Henson
Prosecuting Attorney
Butler County
Poplar Bluff, Missouri

Dear Mr. Henson:

This is in reply to your request for an official opinion of this office which quoted in part was as follows:

"Since this employee was on business for the county and operating county equipment at the time of this collision and is financially unable to post the necessary bond to secure his right to drive, we would like your opinion as to whether or not the County Court, if they so desire, could post this bond for their employee with county funds pending a disposition of the question of liability between the driver of the county equipment and the parties who were involved in the collision with the county truck."

The quoting from Cassidy vs. City of St. Joseph, 247 Mo. 197 at l.c. 205-206:

"Neither the State nor those quasi-corporations consisting of political subdivisions which, like counties and townships, are formed for the sole purpose of exercising purely governmental powers, are, in the absence of some express statute to that effect, liable in an action for damages either for the non-exercise of such powers, or for their improper exercise, by those charged with their execution. This applies alike to the acts of all persons exercising these governmental functions, whether they be public officers whose duties are directly imposed by statute,

Honorable Rex A. Henson

or employees whose duties are imposed by officers and agents having general authority to do so. * * *

It is therefore thought that in accordance with the above doctrine, there is no liability on the part of the county for the automobile accident described in your letter.

In regard to the power of the county court before the adoption of the Constitution of 1945, the Supreme Court in Lancaster vs. Atchison County, 180 S.W. 2d 706, 1.c. 708 declared:

"The county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. These statutes constitute their warrant of attorney. Whenever they step outside of and beyond this statutory authority their acts are void.' * * *

The above limitations on the powers of county courts are further expressed in points 2 and 3 of the above mentioned case at 1.c. 708:

"(2,3) Both parties to this suit agree that counties, like other public corporations, can exercise the following powers and no others: (1) those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation--not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied. ' * * *

A search of the statutes including the county budget law chapter fails to reveal any law permitting county funds to be deposited as security for the payment of the liability of a county employee. In the event a lawsuit between the parties in the accident described should be resolved against the county employee, then, of course, the damages would come out of the principal of the bond posted.

Section 303.230, Cum. Supp. 1953, subsection 2 is as follows:

"2. If such judgment, rendered against the principal on such bond, shall not be satisfied within sixty days after it has become

Honorable Rex A. Henson

final, the judgment creditor may, for his own use and benefit and at his sole expense, bring an action or actions in the name of the state against the company or persons executing such bond."

It is believed from the context of the above premises that the county is in no wise responsible for damages for the possible neglect of one of its employees, at least under the ordinary circumstances. It can readily be seen, therefore, that for the county court to enter into such a bond would be for the county to consent to such liability for the accident as surety. Article VI, Section 25 of the Constitution of 1945 is excerpted for the purposes of brevity here and may be read as follows:

"No county, * * * shall be authorized to lend its credit * * * to any private individual, * * *."

Section 25, thereafter, prohibits authorization of a county to lend its credit to any private individual.

It is therefore believed that there is definite constitutional inhibition against the county court depositing money or giving a bond for an individual to the Safety Responsibility Unit of Missouri.

CONCLUSION

It is, therefore, the opinion of this office that a county court may not post bond of county funds as security for an employee of the county with the Driver's Responsibility Unit of the State of Missouri.

The foregoing opinion, which I hereby approve, was prepared by my assistant, James W. Faris.

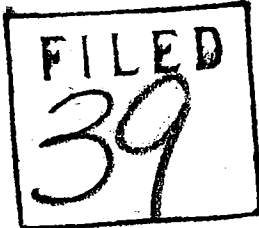
Yours very truly,

JOHN M. DALTON
Attorney General

JWF/b1

ELECTIONS: In cities of ten thousand, person must
VOTERS: be registered in order to be eligible
ABSENTEE BALLOTS: to cast absentee ballot.
REGISTRATION OF VOTERS:

October 26, 1956



Honorable Rex A. Hanson
Prosecuting Attorney
Butler County
Poplar Bluff, Missouri

Dear Mr. Hanson:

This is in response to your request for opinion dated
October 19, 1956, which reads, in part, as follows:

"As I understand it, in a recent opinion you held that the voters in a city such as Poplar Bluff would not be entitled to vote in the general election next month unless they were registered under the new registration law. We now have numerous requests by mail in the County Clerk's Office of this city from people who reside outside of the State of Missouri and who give their voting precinct as a ward within the City of Poplar Bluff for an absentee ballot for the general election and a check with the registration records shows that many of these people are not registered under the new registration law.

"It was my first impression that these people would not be entitled to vote since they are not registered and that mere absence from the state would not excuse them from this registration, and I so informed the County Clerk. Today, however, I had a discussion of the matter with our Circuit Judge and we examined the election laws together and there is now a question in our minds as to whether or not these people are entitled to vote, and we would like an opinion on this question.

Honorable Rex A. Henson

"We have read Section 111.060 of the Revised Statutes which gives the qualifications of a voter; Section 112.010 gives the qualifications of an absentee voter; Section 116.020 contains the qualifications a person must have to register and vote; and Section 116.130 sets out the persons who can vote on election day.

"It appears to us at this time that although the revision in the law probably intended to require all voters including absentee voters to register before they were entitled to vote, the law does not prohibit an unregistered voter from voting by absentee ballot.

"We arrived at this conclusion after reading all of the statutes setting out the qualifications of the voters and then noticing in the restrictions that those voters are restricted who appear at the polling place on election day, but the restriction says nothing about the voter who makes his application by absentee ballot.

"Since the election is a little over two weeks away, you, of course, see the necessity for an immediate opinion on this question, and we would appreciate your assistance as soon as possible."

The first sentence of the above-quoted portion of your opinion request indicates a possible misunderstanding of the opinions rendered by this office with regard to the requirement for registration of voters in cities such as Poplar Bluff. Although it is not part of your problem, but in order to eliminate potential confusion, we are enclosing herewith copy of an opinion of this office rendered to Scott O. Wright under date of August 3, 1955, wherein it was held that persons in cities of ten thousand or over who were registered prior to July 1, 1955, are not obliged to reregister under Senate Bill No. 297 of the 68th General Assembly. Subsequently this office rendered a supplementary opinion on September 6, 1955, to Joseph M. Bone, a copy of which we are also enclosing for your assistance.

Honorable Rex A. Henson

The question raised here, in our opinion, arises because of an erroneous effort to apply Section 116.130, RSMo 1949, to the casting of absentee ballots. That section merely prescribes certain things that must be done by the voter who appears at the polls and by the regular judges of election. It must be remembered that the regular judges of election have nothing to do with the opening or counting of absentee ballots or with the determination of the validity of an absentee ballot. Consequently, we do not believe that Section 116.130 is applicable in any way to the casting of absentee ballots or has any bearing on the question of whether a voter must be registered in order to vote absentee. In order to make this determination it is necessary to look first to the laws governing absentee ballots.

Section 112.010, RSMo 1949, provides that any person being a "qualified elector," other than a person in military or naval service, who expects to be absent from the county in which he is a qualified elector on election day or who is prevented from going to the polls because of illness or physical disability may vote an absentee ballot as provided in that chapter.

Section 111.060, RSMo 1949, sets forth the general qualifications of voters, and Section 116.020, RSMo 1949, applicable to cities of ten thousand or over in counties not having a provision for registration of voters, establishes the further qualification that such voter be registered in the precinct of which he is a resident.

Section 112.060, RSMo 1949, provides for the appointment of persons for the purpose of opening and counting the absentee vote. That section goes on to provide that:

"The persons so appointed shall take the oath prescribed for the regular judges of election and shall at once proceed to open, canvass and count such votes and, having determined that such absent voter or voters are entitled to vote in the respective precincts wherein he or they offer to vote and having been fully satisfied thereof, they shall certify to the county clerk or to the election commissioners, as the case may be, the number of qualified votes to be counted for each of the respective candidates voted for in such election precinct,
* * * (Emphasis ours.)

Honorable Rex A. Henson

It is to be noted also that in the affidavit required of an absentee voter in Section 112.040, RSMo 1949, he is, among other things, required to swear that he is a resident of the precinct or ward in which he offers to vote and that he is "lawfully entitled to vote in such ward or precinct." By reference to Sections 111.060, 112.010 and 116.020, RSMo 1949, he would not be a qualified elector and lawfully entitled to vote in such ward or precinct unless he had registered therein. In the case of State ex rel. Woodson v. Brassfield, 67 Mo. 331, 336, the court said:

"While the registration law was in force, they only were qualified voters whose names were placed on the registration books. This was the final, qualifying act, and no matter if a citizen possessed every other qualification, if not registered, he was not a qualified voter. It was not the right to register which constituted one a qualified voter, but the fact of being registered as such, was also essential. A qualified voter is one who by law, at an election, is entitled to vote. If, by the law, a person was not entitled to vote, whether in consequence of a disability which deprived him of the right to register, or of his neglect to register with a perfect right to do so, he was equally disqualified. * * *"

We are further aided in this construction by reference to Laws of Missouri, 1944, page 27, Section 10 (§112.310, RSMo 1949), which reads as follows:

"Any elector authorized to vote under the provisions of this Act may vote an 'official war ballot' without complying with the provisions of the registration laws of the precinct of his residence."

(We have quoted directly from the laws because of a typographical error in the revision.)

Because of this latter express exemption of voters casting war ballots from the provisions of the registration laws and the

Honorable Rex A. Henson

absence of a similar section applicable to regular absentee voters, we can only conclude that it was not the intention of the Legislature to exempt regular absentee voters from such requirements.

CONCLUSION

It is the opinion of this office that in cities of ten thousand or more in counties not having a provision for registration of voters a voter in order to be eligible to cast an absentee ballot, other than an absentee war ballot, must be registered in the precinct in which he offers to vote.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

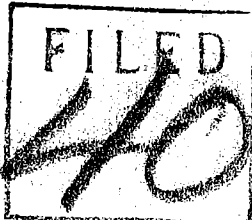
Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml
Encs (2)

ST. LOUIS:
CONSTITUTIONAL LAW:
CITY CHARTER:

A charter adopted by St. Louis City under provisions of Sec. 32(b) of Article VI of the Constitution cannot include provisions for eliminating or changing the method of selecting officers to fill "county offices".



January 12, 1956

Honorable William E. Hilsman
Senator
Third Senatorial District
5734 Bartmer Avenue
St. Louis, Missouri

Dear Senator Hilsman:

This is in answer to your letter of recent date, requesting an official opinion of this office and reading as follows:

"Would you please advise me whether or not a Charter for the City of St. Louis could under the present Constitution of the State of Missouri lawfully include provisions for eliminating or changing the method of selecting officers to fill offices prescribed by statute, such as the Treasurer, License Collector, Collector of Revenue, Sheriff, Recorder of Deeds and Clerk of Circuit Court for the City of St. Louis."

Section 31 of Article VI of the Constitution of Missouri provides as follows:

"Recognition of City of St. Louis as now Existing.-- The city of St. Louis, as now existing, is recognized both as a city and as a county unless otherwise changed in accordance with the provisions of this Constitution. As a city it shall continue for city purposes with its present charter, subject to changes and amendments provided by the Constitution or by law, and with the powers, organization, rights and privileges permitted by this Constitution or by law."

Section 32(b) of Article VI of the Constitution of Missouri provides as follows:

"Revision of Charter of St. Louis.-- The law-making body of the city may order an election by the qualified voters of the city of a board of thirteen freeholders of such city to prepare a new or revised

Honorable William E. Hilsman

charter of the city, which shall be in harmony with the Constitution and laws of the state, and shall provide, among other things for a chief executive and a house or houses of legislation to be elected by general ticket or by wards. Such new or revised charter shall be submitted to the qualified voters of the city at an election to be held not less than twenty nor more than thirty days after the order therefor, and if a majority of the qualified voters voting at the election ratify the new or revised charter, then said charter shall become the organic law of the city and shall take effect, except as otherwise therein provided, sixty days thereafter, and supersede the old charter of the city and amendments thereto."

Under the clear, plain and unequivocal terms of such sections, it is clear that St. Louis, under the present constitution, as under the Constitution of 1875, has both city and county functions, and that a charter for the City of St. Louis must be in harmony with the constitution and laws of the State of Missouri.

The Supreme Court of Missouri has passed on several cases under the 1875 Constitution on the question of whether or not state statutes providing for the election of "county officers" prevailed over provisions in the city charter of St. Louis, or ordinances enacted thereunder, relating to such offices. Such principles of law are equally applicable under the present Constitution of Missouri.

In the case of State ex inf. Barker v. Koeln, 192 SW 748, the Supreme Court said at l.c. 751:

"Section 8057, R. S. 1909 (act of 1879), provides:

"'Whenever the word "county" is used in any law, general in its character to the whole state, the same shall be construed to include the city of St. Louis, unless such construction be inconsistent with the evident intent of such law, or of some law specially applicable to such city.'

"It will appear from the foregoing quoted sections of the charter and statutes that there is an apparent conflict of law with reference to the election of a collector of the city of St. Louis.

"The following provisions of the Constitution of Missouri 1875 may be briefly mentioned as applicable, viz. article 9, § 20, gives to the city of St. Louis the right, in the manner therein

Honorable William E. Hilsman

designated, to adopt a scheme and 'a charter in harmony with and subject to the Constitution and laws of Missouri,' and provides that the charter and scheme when adopted shall 'take the place of and supersede the charter of St. Louis, and all amendments thereof, and all special laws relating to St. Louis county.'

"Section 23 of the same article provides that:

" 'Such charter and amendments shall always be in harmony with and subject to the Constitution and laws of Missouri.* * * The city, as enlarged, shall * * * collect the state revenue and perform all other functions in relation to the state, in the same manner, as if it were a county as in this Constitution defined.'

"Section 25, same article, provides:

" 'Notwithstanding the provisions of this article, the General Assembly shall have the same power over the city and county of St. Louis that it has over other cities and counties of this state.' (Italics ours.)

"The process of logic by which is determined whether the collector of the city of St. Louis is a city officer or a state officer is apt to become confused by reason of the singular and peculiar relationship which the city of St. Louis bears to the state. Loosely speaking any officer elected by the suffrage of the city of St. Louis might be termed a city officer, at least in the sense that he is elected by the vote of the city. The character of the electorate, however, should not necessarily determine the character of the office. The territory confined within the boundaries of the city of St. Louis forms a political subdivision of the state. This territory has no county organization in the ordinary use of that term, but by the Constitution the said city is to 'collect the state revenue and perform all other functions in relation to the state, in the same manner, as if it were a county as in this Constitution defined.'"

The court further said at l.c. 752:

Honorable William E. Hilsman

"That the General Assembly has the power to legislate with reference to the subject of electing collectors of revenue in the different counties of the state there can be no doubt. Having that power over the respective counties, it necessarily follows from the above constitutional mandate that it also has this same power over the political subdivision of the state known as the city of St. Louis. * * * * *

"We therefore hold that the act of 1905 (section 11432, supra) applies to the city of St. Louis, and that, at least since the act of 1905, supra, the general statutory law of the state and not the charter of the city controls the matter of electing or filling the office of collector of the revenue for the city of St. Louis."

In the case of State ex rel. Carpenter v. St. Louis, 2 SW2d 713, at 1.c. 719, the Supreme Court said:

"If we are to construe the Constitution as it reads, St. Louis is subject to legislative control in general, just as other cities are. Section 25 was intended to remove all doubt of that.

"This court in many instances has held invalid municipal measures of St. Louis which were inconsistent with general laws. City of St. Louis v. Deiserner, 243 Mo. 217, loc. cit. 223, 147 S.W. 998, 41 L.R.A. (N.S.) 177; State ex rel. Knese v. Kinsey, 314 Mo. 87, 282 S.W. 437. Some other rulings of this court throw further light upon the subject. The case of State ex rel. Garner v. Mo. & Kan. Tel. Co., 189 Mo. 83, 88 S.W. 41, was a proceeding by mandamus to compel the telephone company to furnish service under an ordinance fixing a maximum rate, and it was held that Kansas City had not been delegated the power under its charter to fix such rates. General observations of the court are pertinent here:

"There are governmental powers the just exercise of which is essential to the happiness and well-being of the people of a particular city, yet which are not of a character essentially appertaining to the city government. Such powers the state may reserve to be exercised by itself, or it may delegate them to the city, but until so delegated they are reserved. The words in the Constitution (article 9, § 16), "may frame a charter for its own government," mean may

Honorable William E. Hilsman

frame a charter for the government of itself as a city, including all that is necessary or incident to the government of the municipality, but not all the power that the state has for the protection of the rights and regulation of the duties of the inhabitants of the city, as between themselves. Nor does the Constitution confer unlimited power on the city to regulate by its charter all matters that are strictly local, for there are many matters local to the city, requiring governmental regulation, which are foreign to the scope of municipal government. In none of the cases that have been before this court bringing into question the charters of St. Louis and Kansas City under the Constitution of 1875 have we given to this constitutional provision any broader meaning than above indicated.' (Italics ours.)

"No distinction is made between St. Louis and Kansas City regarding charter powers. Further in the same opinion (loc. cit. 102 [88 S.W. 43]):

"The Constitutional grant of power under which the charter is formed says that it must always be subject to the Constitution and laws of the state, which we interpret to mean that in all matters not appertaining to city government the charter is subordinate to the will of the General Assembly."

In the case of State ex rel. Dwyer v. Nolte, 172 SW2d 854, the Supreme Court said at l.c. 856:

"In the case of State ex inf. McKittrick v. Dwyer, supra, the issue was as to the validity of the charter provision giving the Mayor power to appoint the Treasurer. The provision was held void as in conflict with the general statutes in relation to the office of County Treasurers. For like reason, that part of the charter fixing the Treasurer's salary is void, it being repugnant to Sec. 13800. 'When the ordinances or charter provisions are or become in conflict with prior or subsequent state statutes, such ordinances or charter provisions are or become void, and must yield to the higher law.'"

It is clear from the rulings of the Supreme Court in the cases quoted from that the charter of the City of St. Louis cannot provide for the election of county officers provided for by the statutes of this state.

An opinion rendered to the Board of Freeholders which was framing a charter for the City of St. Louis rendered under date of February 9, 1950, has been called to our attention. Such opinion holds that in framing a charter for the City of St. Louis provision for the selection

Honorable William E. Hilsman

of county officers can be made in such charter under the provisions of Sec. 18 of Article VI of the Constitution relating to counties of more than eighty-five thousand inhabitants. We are unable to agree with such opinion.

We believe it unnecessary at this time to rule on the question of whether or not a "county" charter, separate and apart from the city charter, authorized by Section 31(b) of Article VI of the Constitution could be framed and adopted under Sec. 18 of Article VI of the Constitution for St. Louis. We are here ruling only on the question of whether or not a charter framed for St. Louis under provisions of Section 32(b) of Article VI of the Constitution could provide for the selection of "county officers".

We believe it to be clear from the provisions of Sec. 18 of Article VI of the Constitution that the charter therein provided for is to be framed by persons chosen as provided in such section, and adopted as provided in such section. Such section contains a complete procedure for the adoption of a county charter. We can find nothing in Sec. 32(b) or Sec. 18 of Article VI of the Constitution, nor in any other section of the Constitution, authorizing the Board of Freeholders of St. Louis chosen under Sec. 32(b) of Article VI of the Constitution to make provision in such charter for the selection of "county officers", as is provided for under Sec. 18 of Article VI of the Constitution. It is our view that Sec. 32(b) and Sec. 18 of Article VI of the Constitution separately provide for the procedure authorized under each section and that a charter framed under Sec. 32(b) cannot contain provisions authorized only by Sec. 18 of Article VI of the Constitution.

CONCLUSION

It is the opinion of this office that a charter framed for the City of St. Louis under the provisions of Sec. 32(b) of Article VI of the Constitution cannot provide for the method of selection of "county officers" provided for by statutes of this state.

The foregoing opinion, which I hereby approve, was prepared by my assistant, C. B. Burns, Jr.

Very truly yours,

John M. Dalton
Attorney General

CBB/ld

UNIFORM SUPPORT OF
DEPENDENTS ACT:



A Prosecuting Attorney should represent the plaintiff in any proceeding under the Uniform Support of Dependents Law in his county, whether such plaintiff resides in his county or in another state, upon, and only upon, the request of the court in which such proceeding is lodged or of the state division of welfare to do so.

March 2, 1956

Honorable Ernest J. Hilgert
Assistant Prosecuting Attorney
St. Louis County
Courthouse
Clayton 5, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"The question has arisen as to whether or not the Prosecuting Attorney should represent the Plaintiff-Petitioner in a Cause filed in another State under the Uniform Support of Dependents Law by a private attorney acting for Plaintiff-Petitioner, the latter being neither indigent nor an applicant for aid to dependent children from her State Division of Welfare.

"It has been the policy in St. Louis County that after a Cause is filed under the Uniform Support of Dependents Law in another State, and the Hearing is held, the papers are then forwarded to this County where the Circuit Clerk docketts the Cause and notifies this office; this office then sets the matter for hearing, the Sheriff serves the Respondent with a copy of all of the papers, the trial is held and a judgment is rendered. Most cases arising under this Act in other States are instituted by Prosecuting Attorneys and are accompanied by the proper paupers' affidavits. However, there is an occasional case which has been instituted by a private attorney. (This office only institutes Causes under the Uniform Support of Dependents Law when we are directed to do so by the St. Louis County Office of the State Division of Welfare.)

"This office would appreciate your opinion as to whether or not our office should represent Plaintiff-Petitioner in all cases arising under the Uniform Support of Dependents Law in other States and coming into this County for final disposition, or whether we should act only in those cases which have been instituted by the direction of the Welfare Agency of

Honorable Ernest J. Hilgert

Plaintiff-Petitioner's County."

All statutory references are to RSMo 1955 Cum. Supp. unless otherwise indicated.

The Uniform Support of Dependents Law provides means whereby a resident of this state, who is under a duty to support dependents in this state, leaves this state and fails to support his dependents, may be brought back to this state; and the means whereby a resident of any other state which has a law similar to Missouri, who is under a duty to support dependents in that state, but who comes into Missouri and fails to discharge that duty, may be apprehended in this state and returned to the state where his dependents reside.

Section 454.020 reads:

"As used in this chapter the following terms shall mean:

"(1) 'State', any state, territory or possession of the United States and the District of Columbia in which this or a substantially similar reciprocal law has been enacted;

"(2) 'Initiating state', any state in which a proceeding pursuant to this or a substantially similar reciprocal law is commenced;

"(3) 'Responding state', any state in which any proceeding pursuant to the proceeding in the initiating state is or may be commenced;

"(4) 'Court', the circuit court of this state and when the context requires, means the court of any other state as defined in a substantially similar reciprocal law;

"(5) 'Law', both common and statutory law;

"(6) 'Duty of support', any duty of support imposed or imposable by law, or by any court order, decree or judgment, whether interlocutory or final, whether incidental to a proceeding for divorce, legal separation, separate maintenance or otherwise;

"(7) 'Obligor', any person owing a duty of support;

Honorable Ernest J. Hilgert

"(8) 'Obligee', any person to whom a duty of support is owed."

Section 454.103 reads:

"The prosecuting attorney, upon the request of the court or of the state division of welfare, shall represent the plaintiff (petitioner), in any proceeding under this law."

In view of the interstate character of this law, we believe that the word "plaintiff", as used above, means a "plaintiff" residing in Missouri, which would make Missouri the instituting state, and a "plaintiff" living in another state, which would make Missouri the responding state. However, it will be noted from Section 454.103, supra, that the duty of the prosecuting attorney to represent the "plaintiff" is strictly limited to those cases in which the prosecuting attorney is requested to represent the "plaintiff" by the court or * * * the state division of welfare * * * in any proceeding under this law". (Emphasis ours.)

The underscored words above would seem to be conclusive that a prosecuting attorney should represent the plaintiff, whether the plaintiff resides in Missouri or in another state "upon request of the court or of the state division of welfare" to do so.

Section 454.117 reads:

"The division of welfare of this state is hereby designated as the state information agency under this law, and it shall be its duty:

"(1) To compile a list of the courts and their addresses in this state having jurisdiction under this law and transmit the same to the state information agency of every other state which has adopted this or a substantially similar law.

"(2) To maintain a register of such lists received from other states and to transmit copies thereof as soon as possible after receipt to every court in this state having jurisdiction under this law."

Section 454.120 reads:

Honorable Ernest J. Hilgert

"When the court of this state receives from the court of an initiating state copies as aforesaid, it shall:

- "(1) Docket the cause;
- "(2) Notify the prosecuting attorney;
- "(3) Set a time and place for hearing not less than ten days nor more than thirty days;
- "(4) Serve upon the obligor copy of said copies at least five days before the day set for hearing;
- "(5) Hear evidence submitted by petitioner and obligor and make and render such orders and judgments as the court adjudges should be made under the provisions of this chapter or discharge the obligor."

It would seem that (2) of Section 454.120, supra, made clear the fact that the prosecuting attorney should, under all circumstances, represent the plaintiff from another state "upon the request of the court or of the state division of welfare" to do so.

CONCLUSION

It is the opinion of this department that a prosecuting attorney should represent the plaintiff in any proceeding under the Uniform Support of Dependents Law in his court, whether such plaintiff resides in his county or in another state, upon, and only upon, the request of the court in which such proceeding is lodged, or of the state division of welfare to do so.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW/ld

INTOXICATING LIQUORS: Railroad licensees must purchase from Missouri wholesalers and under price posting law.



March 12, 1956

Honorable William E. Hilsman
Member of Missouri Senate
Third District
4206 Holly
St. Louis, Missouri

Dear Senator Hilsman:

Your request for the opinion of this office reads as follows:

"On November 8th, 1955, Hon. Hollis M. Ketchum, Supervisor of the Department of Liquor Control, issued a bulletin or letter addressed to 'All Wholesalers, Distillers and Outstate Solicitors' and on the same date issued another document addressed to 'All Railroad Licensees in the State of Missouri'. Copies of these bulletins or letters are attached to this letter. Under Mr. Ketchum's interpretation of our law, every railroad doing business in Missouri must purchase intoxicating liquor bought for the purpose of resale from a Missouri wholesaler under price schedules posted pursuant to the provision of Senate Bill 231 enacted into law at the last session of the Missouri General Assembly.

"I ask your opinion on the following related matters:

"Assume that a railroad operates a commissary in the State of Missouri. This railroad contracts for the purchase of all intoxicating liquors used by it for resale to its passengers in a State other than Missouri. All retail sales by the railroad

Honorable William E. Hilsman

are in States other than Missouri, and no retail sales are made in Missouri. The intoxicating liquors purchased by the railroad for resale in States other than Missouri are sent to its commissary in Missouri, stored here, and loaded into its passenger trains in Missouri. Bearing in mind that the intoxicating liquors purchased by the railroad for resale at retail are merely stored in Missouri at its commissary, and remembering that no retail sale is made in Missouri, and that the purchase of such intoxicating liquor is made in a State other than Missouri, I ask that you advise me by official opinion whether this railroad must now purchase all of its intoxicating liquor in Missouri from Missouri wholesalers at prices posted under the provisions of Senate Bill 231."

The letters or directives, referred to in the request, by the Supervisor of the Department of Liquor Control, respectively, one to all wholesalers, distillers and outstate solicitors, and one to all railroads licensed in the State of Missouri, read as follows:

**"TO ALL WHOLESALERS, DISTILLERS AND
OUTSTATE SOLICITORS:**

"It has come to my attention that railroads in some instances in the State of Missouri have been purchasing intoxicating liquors direct from distillers and outstate solicitors.

"I have advised the railroads licensed to do business in the State of Missouri that they are retail licenses in the State of Missouri and must purchase intoxicating liquor only from duly licensed wholesalers of this state, and further informed them they would have to purchase intoxicating liquor at the posted prices of the schedules in effect of the wholesaler they are purchasing from.

Honorable William E. Hilsman

"The Department of Liquor Control has, by regulation, prohibited miniatures to come into the State, however, an exception has been made for the railroads throughout the years. Since there is this one exception for railroads to purchase miniatures, it will be necessary for the wholesaler receiving an order for miniatures from railroads to request permission of the Department of Liquor Control to make such shipment.

"Enclosed please find copy of letter I have this day sent to all railroad licensees in the State of Missouri.

Very truly yours,

HOLLIS M. KETCHUM
SUPERVISOR."

"TO ALL RAILROAD LICENSEES IN THE STATE OF MISSOURI.

"It has come to my attention that in some instances railroad licensees of this State have been making purchases of intoxicating liquor direct from distillers and outstate solicitors. This is to advise that according to Section 311.200, railroad licensees are defined as being retail licensees in the State of Missouri. Being a retail licensee, you are permitted only to purchase intoxicating liquor from duly licensed liquor and wine wholesale licensees of this State and since August 29, 1955, the effective date of Sections 311.331, 311.332 and 311.333 (Senate Bill 231), you will be required to purchase from Missouri wholesalers at their posted prices of the schedules in effect.

"The Department of Liquor Control by regulation prohibits miniatures, however, an exception has been made for railroads. Railroads have also been permitted to purchase miniatures without Missouri Excise or Inspection Stamps affixed thereto. This

Honorable William E. Hilsman

exception of miniatures being shipped to you without the Excise of Inspection Stamps affixed does not apply to any other size of liquor container other than miniatures. When purchasing any other size liquor containers from Missouri Wholesalers, the Excise and Inspection Stamps must be affixed. With the exception of miniatures you are not permitted to bring intoxicating liquor into the State of Missouri from other states or by any other method without the containers having affixed thereto the Missouri Excise and Inspection stamps.

Very truly yours,
Hollis M. Ketchum
Supervisor."

Inasmuch as the railroad concerning which you have inquired apparently received a copy of the directive of the Supervisor of Liquor Control addressed to "All Railroad Licensees in the State of Missouri," we must presume that the railroad is the holder of a retail license issued under the authority of Section 311.200, RSMo 1949. Were such not the case, the railroad would not be concerned with the directive.

Section 311.280, RSMo 1949, provides:

"It shall be unlawful for any person in this state holding a retail liquor license to purchase any intoxicating liquor except from, by or through a duly licensed wholesale liquor dealer in this state. It shall be unlawful for such retail liquor dealer to sell or offer for sale any intoxicating liquor purchased in violation of the provisions of this section. Any person violating any provision of this section shall be deemed guilty of a misdemeanor."

Inasmuch as the railroad concerned is the holder of a retail liquor license, its purchases from wholesalers are subject to the provisions of the above-quoted section. This section does not take into account subsequent disposition of the liquor by the retail licensee. Its obvious purpose is to regulate delivery to licensees in the state of Missouri and to make certain that intoxicating liquors delivered to licensees within the state of

Honorable William E. Hilsman

Missouri have been properly stamped and the inspection fees imposed under the Missouri law paid thereon.

Inasmuch as the Legislature has expressly required in Section 311.280, supra, that Missouri retail licensees purchase only from, by or through Missouri licensed wholesalers, and makes no exception applicable to a railroad which might actually sell liquor received by it in Missouri in another state, we are unable to interpose any such exception. If such exception is to be provided, it appears to us to be a matter for the Legislature.

Inasmuch as the railroad licensees are required, under Section 311.280, supra, to purchase from Missouri wholesalers only, the application of Senate Bill No. 231, referred to in your opinion request, must automatically follow. That bill prohibits sales by wholesalers in Missouri except in accordance with that act. No exception is made with respect to transactions between wholesalers and any particular class of licensees insofar as the requirements of Senate Bill No. 231 are concerned. Therefore, inasmuch as railroad licensees must purchase from licensed Missouri wholesalers only, who must in turn comply with the requirements of Senate Bill No. 231, it follows that the railroad licensee must purchase at prices posted under the provisions of Senate Bill No. 231.

CONCLUSION

Therefore, it is the opinion of this office that a railroad which operates a commissary in the state of Missouri and which holds a license issued by the Department of Liquor Control for the sale of intoxicating liquor at retail is required to purchase its intoxicating liquor delivered in Missouri from, by or through Missouri licensed wholesalers at prices posted under the provisions of Senate Bill No. 231 of the 68th General Assembly.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

Yours very truly,

JOHN M. DALTON
Attorney General

RRW:ml

SCHOOLS: School district which did not levy at least one dollar for school purposes in 1955 does not
SCHOOL DISTRICTS: qualify for state aid in current school year
under Senate Bill No. 3. Amounts previously
TAXATION: paid may be deducted from apportionment for following school year.



March 14, 1956

Honorable Forrest L. Hill
Prosecuting Attorney
Howard County
Fayette, Missouri

Dear Mr. Hill:

This is in response to your request for opinion dated February 25, 1956, which reads as follows:

"Your opinion on the following is respectfully requested:

"A Howard County common school district levied a property tax of .65 in April of 1955. The State Department of Education, in August of 1955, allocated this district \$1551.17. A payment of \$318.19 was made to this district on September 16, 1955. After Senate Bill No. 3 became law on October 4, 1955, the State Department of Education notified this district that it was entitled to no aid, and charged against future aid the amount of \$318.19 already paid. It is contended that the application of Subsection (3), Sec. 161.025, RS Mo 1949 has been extended beyond the intended scope of the statute. Is this action by the State Department of Education legal?"

Senate Bill No. 3, 68th General Assembly, to which you refer, provides in Section 2, Subsection 3 (Sec. 161.025(3), RSMo, Cum. Supp. 1955), that a school district shall receive state aid for its educational program only if it: "(3) Levies a property tax of not less than one dollar for current school purposes on each one hundred dollars assessed valuation of the district."

Honorable Forrest L. Hill

By virtue of Section 9 of Senate Bill No. 3 (appended as a note to Sec. 161.051, RSMo Cum. Supp. 1955), it was provided that apportionment of state aid should be computed under this law as soon as it was approved by the people. That section reads:

"State aid for each school district under the provisions of this law shall be determined for the current school year immediately following the approval of this act by the people. Any amounts of state aid which have been apportioned prior to the effective date of this act to the several districts for the current school year shall be credited to the districts as partial payment of the amounts due the districts. If any district has received an amount greater than the amount determined as due under the provisions of this act, then the excess payment shall be deducted from the district's apportionment for the following school year."

The "current school year" referred to is, of course, July 1, 1955 - June 30, 1956 (Sec. 163.020, RSMo 1949).

School districts throughout the state were advised through various media that in order to qualify for state aid it would be necessary, under Senate Bill No. 3, to levy a minimum tax rate of one dollar for current school purposes. This increase above sixty-five cents could have been voted by the district after October 4 and in the taxable year of 1955, if it had desired to qualify for state aid. The district not having chosen to do so, it was entirely proper and within the plain intent of the act for the State Department of Education to compute state aid for the current school year under the new act and to exclude such district from further apportionment because it had not complied with the one dollar levy requirement.

CONCLUSION

It is the opinion of this office that a school district which did not levy at least one dollar on the one hundred dollars assessed valuation for current school purposes in the taxable year of 1955 does not qualify for state aid for the current school year, 1955-1956, and that amounts paid to such district prior to October 4, 1955, may be deducted from the district's apportionment for the following school year.

Honorable Forrest L. Hill

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml

CITIES, TOWNS AND VILLAGES: Described financial statement does not meet requirements of Section 79.160 RSMo 1949.



March 30, 1956

Honorable Forrest L. Hill
Prosecuting Attorney
Howard County
Fayette, Missouri

Dear Sir:

The following opinion is rendered in reply to your inquiry reading, in part, as follows:

"Your opinion on the following is respectfully requested:

"The city of Armstrong, Missouri, a city of the fourth class has published the enclosed financial statement in accordance with Section 79.160 RSMo 1949. The question is whether or not the board of aldermen has fully complied with the requirements of this section by it's publication of the condensed statement enclosed herein."

In order that no doubt will exist as to the "financial statement" to which remarks in this opinion are addressed, we quote in full the "financial statement" forwarded with your inquiry:

"FINANCIAL STATEMENT
OF THE
CITY OF ARMSTRONG, MO.
JULY 1, 1955 TO DEC. 31, 1955
July, 1955

DISBURSEMENTS---

Electrical Department	\$ 417.26
Street Department	8.00
Miscellaneous Department	231.98
TOTAL DISBURSEMENTS	\$ 657.24
DEPOSITS---	\$829.49

Honorable Forrest L. Hill

August, 1955

DISBURSEMENTS---	
Electrical Department	\$ 436.26
Street Department	889.00
Miscellaneous Department	107.58
<hr/>	
TOTAL DISBURSEMENTS	\$1,432.84
DEPOSITS---	\$1137.14

September, 1955

DISBURSEMENTS---	
Electrical Department	\$ 657.85
Street Department	93.87
Miscellaneous Department	52.70
<hr/>	
TOTAL DISBURSEMENTS	\$ 804.42
DEPOSITS---	\$1100.58

October, 1955

DISBURSEMENTS---	
Electrical Department	\$ 402.69
Street Department	12.00
Miscellaneous Department	19.18
<hr/>	
TOTAL DISBURSEMENTS	\$ 433.87
DEPOSITS---	\$1130.55

November, 1955

DISBURSEMENTS---	
Electrical Department	\$ 514.03
Street Department	10.00
Miscellaneous Department	103.37
<hr/>	
TOTAL DISBURSEMENTS	\$ 627.40
DEPOSITS---	\$1174.48

Honorable Forrest L. Hill

December, 1955

DISBURSEMENTS---	
Electrical Department	\$ 511.92
Street Department	3.00
Miscellaneous Department	45.00
<hr/>	
TOTAL DISBURSEMENTS	\$ 559.12
DEPOSITS---\$1533.13	
<hr/>	
TOTAL DEPOSITS	\$ 6,905.37
Money on Hand June 30, 1955	3,955.34
<hr/>	
TOTAL	\$10,860.71
<hr/>	
TOTAL DISBURSEMENTS	\$ 4,515.69
Money on Hand Dec. 31, 1955	6,345.02
<hr/>	
TOTAL	\$10,860.71
<hr/>	
MONEY IN SAVINGS ACCOUNT	
AT COMMERCIAL TRUST CO.,	
FAYETTE, MO.	\$ 5,595.00
R. J. Bagby, City Clerk."	

Section 79.160 RSMo 1949, applicable to cities of the Fourth Class, provides:

"The board of aldermen shall semiannually in January and July of each year make out and spread upon their records a full and detailed account and statement of the receipts and expenditures and indebtedness of the city for the half year ending December thirty-first and June thirtieth, preceding the date of such report, which account and statement shall be published in some newspaper in the city."
(Emphasis supplied).

The "financial statement" quoted in the forepart of this opinion cannot, on its face, be construed as a "full and detailed

Honorable Forrest L. Hill

account and statement of the receipts and expenditures and indebtedness" of the city, as such descriptive language is used in Section 79.160 RSMo 1949. It does not purport to descend into details with reference to any of the funds treated in the statement. No citation of authority is necessary to support the conclusion that such "financial statement" is wholly inadequate to meet the minimum requirements of Section 79.160 RSMo 1949.

CONCLUSION

It is the opinion of this office that the "financial statement" referred to in the foregoing opinion does not meet the requirements of Section 79.160 RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO'M:vlw

ELECTIONS: Qualified elector expecting to be absent
ABSENTEE BALLOTS: from his county, or prevented because of
APPLICATION: HOW MADE: illness or physical disability from
voting in regular way at home precinct
on election day, may apply to county clerk
or other officer required to furnish ballots, for absentee ballot
within time and manner provided by Sections 112.020 and 112.030,
RSMo 1949. Application can be made personally by elector, or by
written application sent first class mail, but application cannot
be made or sent by elector's agent.

FILED

40

June 27, 1956

Honorable Forrest L. Hill
Prosecuting Attorney
Howard County
Fayette, Missouri

Dear Sir:

This department is in receipt of your recent request for
a legal opinion, reading as follows:

"According to Section 112.020 RSMo. 1949,
applications for absentee ballots are to be
made in person or by mail. May a person
other than the one completing the application
take it in person to the county clerk."

This right of qualified voters to vote absentee ballots is
not a vested right in the strictest sense, but is one guaranteed
by Section 6, Art. VII, Constitution of Missouri 1945, which
reads as follows:

"Qualified electors of the state who are
absent, whether within or without the state,
may be enabled by general law to vote at all
elections by the people."

The right to vote an absentee ballot is a special privilege
and can be exercised only in accordance with the constitutional
and statutory provisions applicable thereto. The above quoted
constitutional provision empowers the Legislature to enact laws
regulating the rights of qualified voters to vote absentee
ballots.

The General Assembly has seen fit to implement the above
quoted constitutional provision and has enacted Chapter 112,
RSMo 1949, on absentee voting.

Honorable Forrest L. Hill

Section 112.010, RSMo 1949, provides what citizens are qualified to vote absentee ballots and reads as follows:

"Any person being a duly qualified elector of the state of Missouri, other than a person in military or naval service, who expects to be absent from the county in which he is a qualified elector on the day of holding any special, general or primary election at which any presidential preference is indicated or any candidates are chosen or elected, for any congressional, state, district, county, town, city, village, precinct or judicial offices or at which questions of public policy are submitted, or any person who through illness or physical disability expects to be prevented from personally going to the polls to vote on election day, may vote at such election as herein provided."

Sections 112.020 and 112.030, RSMo 1949, specifies the procedure that shall be followed by one in making application for an absentee ballot. Section 112.020 reads as follows:

"Any elector as defined in the foregoing section expecting to be absent from the county of his residence on the day of such election, or expecting to be prevented through illness or physical disability from personally going to the polls to vote on election day, and shall attach to his application a certificate of illness or disability attested to by a licensed physician or duly accredited practitioner of Christian Science may, within thirty days next before the date of such election and up to six o'clock p.m. on the day before any election, make application in person, or by mail, to the county clerk or, where existing, to the board of election commissioners, or other officer or officers charged with the duty of furnishing ballots for such election in his voting precinct, for an official ballot for said precinct to be voted at such election."

Honorable Forrest L. Hill

In the event the elector shall have recovered from his illness or physical disability sufficiently to permit him to present himself at the proper polling place for the purpose of casting his ballot, or in the event such elector shall be in the county of his residence on election day, the absentee ballot cast by such elector shall be void, and such elector shall notify the county clerk of the removal of such disability before six o'clock p.m. on the day following the day of election."

Section 112.030 reads in part as follows:

"Application for such ballot may be made on a blank to be furnished by the county clerk or the board of election commissioners or other officer or officers charged with the duty of furnishing ballots as aforesaid, or may be made in writing by first class mail addressed to such officer or board signed by the said applicant. Immediately upon receipt of such application within the time and in the manner provided, the county clerk of the county, or the board of election commissioners, if any, or other official charged with the duty of furnishing ballots to such applicants, shall make a list of the names of such absent voters whose applications for ballots have been received, and shall cause such list to be immediately posted in a conspicuous place accessible to the public at the entrance of the office of such officer or officers which list shall show also the post office address, street address, ward or precinct number given by such applicant. * * * * * provided, that no county clerk, board of election commissioners or other proper official charged with the duty of furnishing such ballots after examination of the records, or otherwise ascertaining the right of such person to vote at such

Honorable Forrest L. Hill

election shall be required to furnish any ballot or ballots to any person desiring to vote who is not lawfully entitled to vote, and if the applicant for ballot or ballots is entitled to receive same, the county clerk or the board of election commissioners, if any, or other official charged with the duty of furnishing such ballots immediately upon receipt of the printed ballot shall send by registered mail postage prepaid, or deliver in person an official ballot or ballots if more than one are to be used and voted at said election to such applicant. The official charged by law with printing and supplying ballots under the general election laws of this state, shall, at least thirty days before any election at which absentee ballots may be used, cause to be printed and supplied a sufficient number of ballots to be designated as 'official absentee ballots' to be furnished such absentee voters."

We note that the last above quoted sections do not define the terms "in person" or "by mail," and there is no indication it was the legislative intent these terms were to be given any technical or special meaning or any other than their plain or ordinary meaning, hence, it is assumed that the latter meaning was intended. We are unable to find any Missouri court decisions in which said terms have been defined, but we do find the Texas case of Rogers v. Moore, 97 S.W. 685, in which the words "in person" and "by mail" were construed as they appear in the Revised Statutes of Texas of 1895, as amended by the Act of 1903, Law, Regular Session. Said laws pertain to the levying of executions by officers and the notices required to be given the defendants and their attorneys.

It is believed that the terms "in person" and "by mail," as used in the Texas statute and discussed by the court are used in their plain or ordinary meaning and that the explanation given of said terms is very helpful in construing such terms as used in Sections 112.020 and 112.030, supra. At l.c. 685, the court said:

"In 1895 the statute was amended so as to require further notice to be given 'by delivering to the defendant in execution'

Honorable Forrest L. Hill

a copy of that which was to be posted. By the act of 1903, before referred to, the manner of giving notice was charged so as to provide for the publication thereof in a newspaper, and the further requirement was added that the officer 'shall give the defendant or his attorney written notice of such sale either in person or by mail.' This gives to the officer the choice of two methods, one in person and the other by mail, and notice by mail is given by mailing the paper. To hold that the officer must see that the defendant in the writ actually receives the notice would be equivalent to holding that he must give personal notice."

The absentee voting law is, in a sense, a special one in that it is supplemental to the election laws pertaining to voting generally. The former provides a method by which a qualified elector as referred to in Section 112.010, supra, expecting to be absent from his county, or who is prevented by illness or physical disability from going to the polls and voting on election day, may vote on absentee ballot. In order to cast his absentee ballot, the elector must apply and then vote in the manner and within the time provided by the statutes. Such law has been in effect in one form or another for many years.

The absent voters law, Laws of 1913, page 323, had some of the characteristics of the absentee voters law particularly in that the former provided a method by which an absent elector could vote even though absent from his voting precinct on election day. Under provisions of that law, the voter could apply at any precinct within the State on election day for an absentee ballot, and have such ballot counted at his home precinct. He was required to make the prescribed affidavit, with the names of the election judges on the back. Failure to comply with the law in making the application and voting, especially regarding the affidavit and names of the judges written on the back, were sufficient grounds for the ballot not to be counted.

In the case of *Straughan v. Meyers*, 268 Mo. 589, the absentee voters law of 1913 was held not to be a special law within the meaning of the constitution and was therefore constitutional.

The court discussed the characteristics of the law including the purpose for which it was enacted, and held that the provisions

Honorable Forrest L. Hill

making certain requirements of the elector when applying for a ballot were mandatory. At l.c. 592 the court said:

"Let us now consider the requirements and character of the act under review. In the first place, it was enacted to provide the means and machinery through which a certain class of citizens might enjoy a privilege which, under the general laws, could not be exercised. Its beneficiaries are of one class and specially favored, and they vote under conditions altogether different to others. The act itself declares (Sec. 1) that they can avail themselves thereof only upon the conditions and under the regulations specified. As early as Smith v. Haworth, 53 Mo., l.c. 89, this court said:

"It is a very salutary rule, long sanctioned by reason, experience and authority, that special laws, that give origin to new and unexpected departures from general rules, should be closely scrutinized, and the powers therein conferred strictly construed."

* * * * *

"It has been urged against this act that it is vicious and dangerous, because capable of being made an instrument of fraud, and, therefore, a means of defeating the public will. In the absence of proper safeguards we can conceive of such consequences, but when the provisions of the act are strictly complied with we think they afford a fairly sufficient shield against this. These safeguards should, however, not be destroyed by construction, but should be carefully preserved, in order to give life, force and beneficent effect to the act. The affidavit of the voter and the names of the judges where the ballot is procured are essential to guard against fraud and to properly identify the ballot and voter, as well as to warrant the county court or election board in acting thereon. Unlike the requirement of the general election law that the ballot contain the initials, the object of these requirements is to guard

Honorable Forrest L. Hill

against the procuring and counting of illegal ballots, rather than against fraud while the election is actually in progress. It is our opinion that before a voter can avail himself of this special privilege it is incumbent upon him to see that these provisions are complied with, and that failing to do his ballot should not be counted. These provisions relating to the duties of the authorized election officers after the receipt of a properly prepared ballot should be construed as were the provisions of the general election laws in the cases heretofore cited."

In view of the foregoing, it is our thought that in Sections 112.020 and 112.030, supra, the Legislature has seen fit to provide only two methods by which a qualified voter expecting to be absent from his county, or who is prevented from illness or physical disability from going to the polls at his home precinct and voting on election day, may apply for an absentee ballot, and each method is optional with the voter.

1) He may personally appear before the county clerk or other proper official charged by law with the duty of furnishing ballots, and make his application, and may be furnished a blank upon which to make such application. In contemplation of the statutes, "in person" means, the person of the elector only, and he is unauthorized to have another person appear for and in his behalf to make the application.

2) The elector may send his application for an absentee ballot to the county clerk or other official charged by law with the duty of furnishing ballots, by first class mail.

It is believed that the exact form of the application thus mailed is immaterial. An informal letter addressed to the proper official containing a request for an absentee ballot, the applicant's name and address, and sufficient information to satisfy the officer that the applicant is a qualified voter and entitled to vote an absentee ballot, would be sufficient. However, since the statute provides the written application is to be mailed, we do not believe the application could be sent to the county clerk or other official by any other means, such as by the hand of the applicant's agent.

To hold that the completed application could be delivered to the county clerk by someone other than the applicant would unnecessarily open the door to fraud by affording great opportunities

Honorable Forrest L. Hill

for changing the application in accordance with the will of the messenger or others, and without the knowledge or consent of the applicant. Apparently, it was for the purpose of obviating such occurrences that the lawmakers enacted the statutes providing that the application for absentee ballot was to be made in person or by first class mail.

CONCLUSION

It is therefore the opinion of this department that when a qualified elector expects to be absent from his county on election day, or expects to be prevented, because of illness or physical disability from going to the polls and voting at his home precinct on election day, he may make application to the county clerk, or other official charged by law with the duty of furnishing ballots, for an absentee ballot, within the time and manner provided by Sections 112.020 and 112.030, RSMo 1949. Said application can be made personally by the elector, or he may make written application by first class mail, but cannot make or send in such application by an agent.

The foregoing opinion, which I hereby approve, was written by my Assistant, Paul N. Chitwood.

Yours very truly

John M. Dalton
Attorney General

PNC:ma:gm .

COUNTY COURT: County court not authorized to submit
ELECTIONS: question of relocating polling places
POLLING PLACES: to voters at general election in 1955.

October 19, 1956



Honorable Forrest L. Hill
Prosecuting Attorney
Howard County
Fayette, Missouri

Dear Mr. Hill:

This is in response to your request for opinion dated October 16, 1956, which reads, in part, as follows:

"Is the County Court of a third class county authorized to submit the question of re-locating the place of voting in a certain election precinct to the voters residing in that precinct on November 6, 1956? This proposal would be submitted on a separate ballot."

In an opinion rendered to Honorable John R. Caslavka dated January 21, 1952, copy enclosed, this office construed Sections 111.220, 111.240 and 111.380, RSMo 1949, as follows:

"In reading the above-quoted sections we construe them to mean that the duty of designating the places of holding elections, or the polling places, is initially imposed on the county courts of the several counties."

A search of the statutes does not reveal any statutory authority for the submission of the question of the location of polling places to the voters. In the case of State ex rel. Edwards v. Ellison, 271 Mo. 123, 129, 196 SW 751, the Supreme Court of Missouri said:

" * * * It is the law of this State that 'no election can be held unless provided for by law' (State ex rel. v. Jenkins, 43 Mo. 1.c. 265) * * *."

Honorable Forrest L. Hill

See also State ex inf. Rice ex rel. Allman v. Hawk, 360 Mo. 490, 228 SW2d 785, 787.

CONCLUSION

It is therefore the opinion of this office that the county court of a third class county is not authorized to submit the question of relocating the place of voting in an election precinct to the voters at the election to be held on November 6, 1956.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml
Enc.

DELINQUENT TAXES:
LAND SALE:
INNOCENT PURCHASER:
RECOVERY OF PURCHASE
PRICE AND TAXES:

An innocent purchaser of land at a tax sale for delinquent taxes, which sale is held by mistake of the collector, can recover the purchase price of the land and the total sum of any taxes which he may have paid upon the land.

January 11, 1956

FILED
41

Mr. Robert Hoelscher
Prosecuting Attorney
Warren County
Warrenton, Missouri

Dear Sir:

On November 18, 1955, you wrote to us as follows:

"In November 1942 a tract of land in Warren County, Missouri was sold by the collector of revenue for delinquent taxes. The purchaser at that sale obtained his deed in due course and has since that time paid the taxes assessed thereon.

"Our present collector has now discovered that the land was doubly assessed. In other words, the true owners of the land were not delinquent in their taxes when the land was sold in 1942. The sale was held for the taxes under the erroneous assessment.

"Our collector has requested that I secure your opinion as to who is liable for this mistake and whether or not the purchaser at the tax sale can recover the purchase money and the money paid out for taxes."

On December 13, 1955, you wrote, in response to a request by us for a clarification of your first letter, as follows:

"In reply to your letter of December 9, 1955. The land in question was assessed to two different people. The party who had no interest in the land naturally did not pay taxes on it and the sale was made under the assessment against him. The original owner has since reclaimed his land and is now in possession."

Mr. Robert Hoelscher

On the basis of the above two letters, it would appear that the situation is as follows: "A" was the owner of a tract of land upon which taxes were duly assessed each year to him, which taxes were each year duly paid by "A"; then upon a certain year, by error, the same land was also assessed to "B", who was rendered a tax bill, to which he paid no attention; this situation continued for the statutory period, after which the land was sold for delinquent taxes, based upon the failure of "B" to pay the taxes, which taxes, as we noted above, were being regularly paid each year by "A", the true owner; at the tax sale "C" purchased the land, and in subsequent years paid taxes upon it, after which "A" reclaimed the land. "C" is out the purchase price of the land and the taxes he has paid, and has nothing to show for his outlay.

Your question is whether "C" can obtain relief and, if so, how? In this regard we refer to Section 139.280, which reads:

"Any collector of the public revenue for the state, or for any county or town therein situate, who shall fail to make a true return of all lands or other real estate to the proper officer, according to law, on which the taxes have been duly paid, so that the same shall, by the cause of his negligence, delinquency or misconduct, be advertised and sold as delinquent lands, shall forfeit to the innocent purchaser in good faith of such lands, at the time and place appointed for the public sale of the same, one hundred per cent damages in the sum so paid by the innocent purchaser to such collector, and ten per cent per annum interest thereon until the same is paid to such purchaser, recoverable in any court having competent jurisdiction, and in case the owner of the land is compelled to bring suit to remove a cloud upon his title, erroneously sold by the collector for alleged nonpayment of taxes which have been paid to said collector, and not truly returned paid by him, the said owner may sue for and recover of said collector on his bond, as damages, all costs of said suit, and a reasonable attorney's fee, to be taxed by the court as costs in the case, and shall also pay to the owner of said lands so erroneously sold, all such damages, including attorney's fees for recovering the same, or removing cloud from the title thereof, as such owner may sustain by reason of such wrongful or erroneous sale, such penalty and damages to be recovered in any court having competent jurisdiction in ordinary civil actions."

Section 140.530 RSMo 1949, reads:

Mr. Robert Hoelscher

"No sale or conveyance of land for taxes shall be valid if at the time of being listed such land shall not have been liable to taxation, or, if liable, the taxes thereon shall have been paid before sale, or if the description is so imperfect as to fail to describe the land or lot with reasonable certainty and for the first two enumerated causes, the money paid by the purchaser at such void sale shall be refunded, with interest, out of the county treasury, on order of the county court."

We believe the two above statutes are the applicable ones in the situation which you presented, and that under them a recovery of purchase price and taxes paid by the tax sale purchaser on the property purchased may normally be had.

Since this tax sale took place in 1942, the matter of the applicability of the statute of limitations must be considered, but regarding it we make no ruling here.

CONCLUSION

It is the opinion of this department that a person who purchases land at a tax sale, which land was sold for delinquent taxes wrongfully assessed, which land subsequently was recovered from the purchaser by the true owner, the purchaser may recover the amount of the purchase price and the amount of taxes which he has paid upon such land. No ruling is made herein concerning the applicability of the statute of limitations.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW/ld

CITIES:
BOARD OF ALDERMEN:
POWERS OF BOARD OF ALDERMEN:
FUNCTIONS OF CITY:
MONEY IN THE GENERAL FUND:
CITY HALL:
PLAYGROUND SITE:

(1) A fourth class city, through its board of aldermen, may purchase land to be used for a city hall or playground site. (2) The money in the general fund may be used in payment for such lands.

FILED

April 18, 1956

Honorable Haskell Holman
State Auditor
Jefferson City, Missouri

Dear Mr. Holman:

This will acknowledge receipt of your opinion request of April 5, 1956, in which you ask the following:

"Will you please furnish this department with an official opinion based upon the following questions:

1. Is it permissible for the board of aldermen of a city of the fourth class to use money in the general fund for the purpose of purchasing a tract of land to be used for a city hall or playground site?
2. If not, what method is provided by the statutes for the purchase of land to be used for such purposes?"

Before holding that the money in the general fund may or may not be used as suggested in the opinion request, it must be determined whether or not the board of aldermen have the authority to make such a purchase.

Under Section 90.010, RSMo 1949, whenever any city desires to establish a park or pleasure ground, the board of aldermen is authorized to purchase the lands therefor. Said Section reads as follows:

"Whenever any city desires to establish a park or pleasure grounds, the common council or mayor and board of aldermen of such city is hereby authorized and empowered to acquire property for such purposes by gift, purchase or condemnation of lands in such city or within one mile thereof, and for that purpose may borrow money and issue bonds in payment thereof, and shall by ordinance describe the metes and bounds of such lands to

Honorable Haskell Holman

be purchased or condemned. Lands owned by such city may by ordinance be converted, set aside or appropriated for parks, or pleasure grounds. Such city may levy an annual tax not to exceed two mills on the dollar for the maintenance of such parks or pleasure grounds, and such tax shall be levied and collected in like manner with other general taxes of such city and shall be known as the park fund."

It appears to this writer that "park or pleasure grounds" is broad enough to include playground sites. There are no cases construing "pleasure ground." Under the above section, however, the word, "parks," has been construed to be broad enough to include contemplated baseball and football fields and large arena buildings adapted to speaking, theatrical, and musical entertainments, dances, and indoor athletics, and a hall to accommodate small gatherings, benefits, and exhibits of various kinds. *Aquamsi Land Company vs. City of Cape Girardeau*, 142 S.W. 2d 332, 346 Mo. 524.

Chapter 79 of the RSMo 1949, is entitled "Cities of Fourth Classes." Under Section 79.390, it is provided that the board of aldermen may provide for the erecting, purchase or renting of the city hall and may purchase and hold grounds for public parks. Said section reads as follows:

"The board of aldermen may establish, alter and change the channel of watercourses, and wall them and cover them over, and prevent obstructions thereon, and may establish, make and regulate public wells, cisterns and reservoirs of water, and provide for filling the same. The board of aldermen may purchase grounds and erect and establish market houses and market places, and regulate and govern the same, and also contract with any person or persons, association or corporation, for the erection, maintenance and regulation of market houses, and market places, on such terms and conditions and in such manner as the board of aldermen may prescribe. They may also provide for the erection, purchase or renting of the city hall, workhouse, houses of correction, prisons, engine houses, and any and all other necessary buildings for the city, and may sell, lease, abolish or otherwise dispose of the same, and may enclose, improve, regulate, purchase, or sell all public parks or other public grounds

Honorable Haskell Holman

belonging to the city, and may purchase and hold grounds for public parks within the city, or within three miles thereof."

The power "to erect, purchase or rent" a city hall would seem to imply or carry with it the power to purchase the site for the hall. It was held by the Supreme Court of Missouri in the case of City of Rich Hill vs. Connelly, 175 S.W. 2d 834, that the constitutional power of fourth class cities to issue bonds for the purpose of "purchasing or constructing electric light plants" includes power to issue bonds to purchase or construct extensions or improvements to existing plants.

That the board of aldermen have the power to purchase or to make such purchase is implied from the fact that any corporation can act only through its lawfully authorized agent. The board of aldermen is the governing body of the city and it exercises all the corporate powers not expressly committed by law to other boards or officers. 43 O.J. 238. Also by statute, the board of aldermen is given the authority to make such purchases. The power to purchase the land to be used for a city hall or public park site is in the board of aldermen under Section 79.390, supra. Such power, with respect to parks and pleasure grounds is found in Section 90.010, supra.

Now the question is, may money in the general fund be used for the purchase of such lands? There appears to be no reason why such may not be done. The statutes are silent on this matter except that Section 90.010, supra, provides that the city "may borrow money and issue bonds" in payment for the lands to be used for a park or pleasure grounds. The explanation of such language seems to be that in the absence of such, the authority to borrow money and issue bonds for such purpose would be questionable. The language does not imply that money in the general fund may not be used as suggested.

This writer believes that the case of Decker vs. Diemer, 229 Mo. 296, 129 S.W. 936, even though the question therein concerned the authority of the county court to use surplus county funds, can be cited as authority for holding that the payment of land to be used for a city hall or playground site can be made from the general fund. Involved in the case was the transfer of surplus funds of the county to a courthouse fund for the purpose of constructing a courthouse. The court held that the transfer was not improper. Admitting that the statutes involved in the case were different from those involved in the question with which we are concerned

Honorable Haskell Holman

in that the transaction was on the county level, yet the reasoning of the court can be applied to the question at hand. The court at l.c. 336, of the official report said:

"* * * We are further of the opinion that when all warrants and debts properly chargeable to a fund in any one year are paid and provided for, the residue of such fund is a 'surplus' within the purview of the transfer sections. Is not the building of a courthouse as legitimate as any other county purpose? Are bonds so desirable that the people of a Missouri county must bond themselves when bonds are not necessary, or go without a courthouse? Must they levy special taxes when they have the means in the treasury to avoid such special levy? Running like a thread through the statutes is the idea of as low a rate of taxation as is compatible with the welfare of the people, and the other idea that the county's business must be done for cash. All these ideas are conserved by the holding made."

There being no earmarking of the money in the general fund for any particular purpose, and no statutory provision as to the source from which payment for such land is to be made, the board of aldermen may use money in the general fund for the purpose of purchasing a tract of land to be used for a city hall or playground site.

CONCLUSION

It is, therefore, the opinion of this office that:

- (1) A fourth class city, through its board of aldermen, may purchase land to be used for a city hall or playground site.
- (2) The money in the general fund may be used in payment for such lands.

Yours very truly,

JOHN M. DALTON
Attorney General

CITIES OF THE Surplus funds of a waterworks system of a
FOURTH CLASS: city of the fourth class may be invested
SURPLUS WATER- in government bonds or placed on time de-
WORKS FUNDS: posit in a depository.



May 10, 1956

Honorable Haskell Holman
State Auditor
Jefferson City, Missouri

Dear Mr. Holman:

In your recent request for an opinion from this office
you stated your question as follows:

"In a recent audit of a city of the fourth
class a surplus remained in the waterworks
fund after the current bonds and interest
obligations had been retired. Is a city
of this class permitted to invest such sur-
plus in government bonds or place on time
deposit until such time these funds are
needed to retire future obligations?"

Section 79.470, RSMo 1949, states that the board of al-
dermen of a fourth class city shall "have power to enact and
make all such ordinances and rules, not inconsistent with the
laws of the state, as may be expedient for maintaining the
peace and good government and welfare of the city and its trade
and commerce; * * *". This would seem to be a quite general
grant of authority. In the event that some other section spe-
cifically, on the question here, did not preclude the invest-
ments mentioned this section would certainly suffice for the
authority to make them.

Section 91.240, VAMS., reads as follows:

"There shall be selected a depository
for the funds of the waterworks sys-
tem in the manner as provided by sec-
tion 95.280, and all moneys received
from water consumers shall be deposited
daily by the manager of the said water-
works system, and all to be drawn out
of such depository on warrants drawn
upon said depository and signed by the

Honorable Haskell Holman

president of the board of waterworks commissioners with the seal of the board attached, countersigned by the mayor."

Section 95.280 mentioned therein, concerns cities of the third class, but, as noted, Section 91.240 makes it applicable to the fourth class cities as well.

The city council mentioned in Section 95.280 would pertain to the board of aldermen in a fourth class city. That section provides for the council or board of aldermen to select a depository within the city, after seeking sealed bids from the banks therein stating the interest they offer to pay to the city for the privilege of being made the depository for a year. Section 95.285 provides that the bank shall put up security for the deposits; Section 110.010, 1955 Cum. Supp., RSMo 1949, states what kind. Section 95.280 was written prior to the time that federal legislation precluded members of the federal reserve system and banks under the FDIC from paying interest on demand deposits, and prior to Section 362.285 of our statutes which precludes payment of interest on demand deposits in excess of that allowed by member banks of the federal reserve system or those insured under the FDIC. It is not applicable now to demand deposits because Section 110.030, RSMo 1949, says that:

"The various statutory provisions in relation to the advertisement for and receipt of bids and the award of the funds, to the best bidder or bidders * * *" for such funds "shall be applicable only if and when, at the time of said advertisement and award, it shall be lawful for banking institutions to pay interest upon demand deposits, * * *."

Sections 91.240 and 95.280 apparently are applicable if money is placed on time deposit.

There appears to be no reason why all such funds have to be put in demand deposits. For instance, there is no provision requiring it for cities as Article IV, Section 15, of the Constitution, requires it for the state funds in the hands of the Treasurer. Section 110.010 provides, among other things, that city funds that are deposited under statutes " * * * requiring the letting and deposit of the same and the furnishing of security therefor * * *" shall be secured by the deposit of the kind

Honorable Haskell Holman

of securities listed in Section 30.270 RSMo.

The city funds in questions are "let" all right. Or if no satisfactory depository can be selected, they may be invested. (See Section 95.355, RSMo.) And if let the depository shall furnish "security therefor," as noted above. But it doesn't follow from that, that all the funds have to be placed on demand deposit.

The very fact that in certain situations some funds may be invested is an indication that the legislature did not contemplate that all of such funds be placed on demand deposits.

Certainly, Section 91.240, as well as other sections pertaining to the waterworks system contemplate that a sufficient amount will be on hand to meet the current needs. But, in the event the waterworks commissioners determine that the daily deposits, or an amount from the surplus if needed, are sufficient to meet the current needs, then we know of no provision against the city placing the surplus on time deposit.

Turning now to the question of investment in government bonds, it is noted that Section 95.355, RSMo, provides that if a satisfactory depository cannot be selected or satisfactory arrangements made, the board of aldermen are empowered and authorized to loan such moneys (meaning the various funds of fourth class cities) upon the same terms and under the same conditions as provided by law for the loaning of county and school moneys. This section is supplementary to Sections 91.240 and 95.280.

Article IX, Section 7, of the Constitution, and Section 171.010, RSMo, authorize the investment of school moneys in government bonds. Therefore, Section 95.355 authorizes the investment of the funds in question in government bonds.

CONCLUSION

In view of the above, it is the opinion of this office that the surplus remaining in the waterworks fund of a fourth class city may be invested in government bonds or may be placed on time deposits by the city.

Honorable Haskell Holman

The foregoing opinion, which I hereby approve, was prepared by my assistant, Russell S. Noblet.

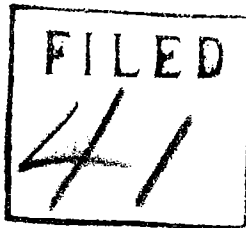
Very truly yours

John M. Dalton
Attorney General

RSN:lc

COUNTIES:
COUNTY COURTS:
LEGAL PUBLICATIONS:

The compensation to be allowed to the editor of a newspaper for publishing a county financial statement would be governed by the rates specified in Section 493.030 RSMo Cum. Supp., 1955, unless a lesser amount was otherwise agreed upon.



July 12, 1956

Honorable Haskell Holman
State Auditor
Capitol Building
Jefferson City, Missouri

Dear Mr. Holman:

Reference is made to your request for an official opinion of this office, which request reads as follows:

"Please furnish this Department with an official opinion on the following question: What would be the basis of computing the compensation for the Editor of a newspaper for publishing a 1955 financial statement required to be published, under the provisions of Section 50.800 R.S.Mo., 1949?"

Section 50.800, RSMo 1949, to which you refer, provides that on or before the first Monday in March of each year the county court of each county in the state shall prepare a public and detailed financial statement of the county for the year ending December 31st. Said publication shall be in some newspaper of general circulation published in the county, if such there be. Nothing is contained in this section or in following sections relating to the same subject, in regard to the basis of computing the compensation to be allowed to an editor of a newspaper for such publication. In the absence of a special provision, your attention is invited to Section 493.030 RSMo Cum. Supp., 1955. Said section provides as follows:

"When any law, proclamation, advertisement, nominations to office, proposed constitutional amendments or other questions to be submitted to the people, order or notice shall be published in any newspaper for the state, or for any public officer on account of or in the name of the state, or for any county or for any public officer on account of, or in the name of any county, there shall not be charged by or allowed to any such newspaper for such

publications a higher rate than three cents per word for each insertion for all type matter which is set solid in any one size of type. When any law, proclamation, advertisement, nominations to office, proposed constitutional amendments or other questions to be submitted to the people, order or notice, require, either wholly or partially more than one size of type, or the use of any emblem, or the spacing of lines so as to have a blank space between the lines, or tabular matter, the rate shall be computed by the square inch of space used, which rate shall not exceed the rate of seventy-five cents per square inch or major fraction thereof for each insertion. As used herein the term 'word' means any letter, figure or group of letters or figures as set apart by a space. In all counties of the first class the maximum established herein shall not exceed five cents per word or one dollar and twenty-five cents per square inch. All laws or parts of laws in conflict herewith, except sections 493.070 to 493.090, are hereby repealed."

It is to be noted that this section provides that "when any * * * notice * * * shall be published in any newspaper * * * for any county or for any public officer on account of or in the name of the county," there shall not be charged or allowed a higher rate than therein specified. We are of the opinion that such provision is sufficiently broad so as to include the publication of the financial statement required by Section 50.800, RSMo 1949.

Section 493.040, RSMo 1949, provides that in procuring the publication of any notice as in Section 493.030, RSMo Cum. Supp., 1955, above mentioned, the public officer shall accept the most advantageous terms that can be obtained, not exceeding the rates limited by Section 493.030, RSMo Cum. Supp., 1955.

It is the opinion of this office that the basis of computing the compensation of an editor of a newspaper for publishing a county financial statement would be the amounts specified in Section 493.030, RSMo Cum. Supp., 1955, unless terms more advantageous to the county were otherwise agreed upon.

CONCLUSION

Therefore, it is the opinion of this office that the compensation to be allowed to the editor of a newspaper for publishing a county

Honorable Haskell Holman

financial statement would be governed by the rates specified in Section 493.030, RSMo Cum. Supp., 1955, unless a lesser amount was otherwise agreed upon.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

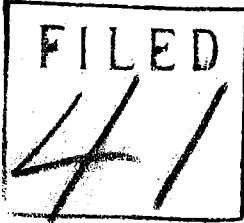
Very truly yours,

John M. Dalton
Attorney General

DDG/ld

SCHOOLS: School board may pay teacher only salary specified in contract for services encompassed by contract; board may make separate agreement for other services not included within scope of teaching contract; salary schedule may be included in teacher's contract and must be made part of contract to be effective.

SCHOOL DISTRICTS:



August 20, 1956

Honorable Haskell Holman
State Auditor
Capitol Building
Jefferson City, Missouri

Dear Mr. Holman:

This is in response to your request for opinion dated June 8, 1956, which reads as follows:

"In a recent audit of a six-director school district it was found that the board of education paid additional compensation on an hourly basis to various teachers in addition to the compensation stipulated in the teacher's contract for the performance of extra-curricular duties. Also, the board of education paid teachers who had earned additional college credits on a different salary rate than the amount specified in the teacher's contract. In connection therewith, the conditions of the teacher's contract are as follows:

'THIS AGREEMENT made the ____ day of ____ 19__ between ____, a legally qualified public school teacher, of the first part, and the Board of Education of the ____ School District, County of ____, State of Missouri, of the second part.

'WITNESSETH: That the said ____ agrees to teach in the public school of said ____ District and to perform such extra-curricular duties as assigned by the principal of the school for the term of ____ months, commencing on the ____ day of ____ 19__, for the sum of ____ per year, to be paid monthly, and that for services properly rendered and reports

Honorable Haskell Holman

correctly made, according to law said Board agrees to issue warrant upon the Treasurer of the _____ School District in favor of the said _____ for the amount due under this agreement.'

"In addition to the provisions of the aforesaid contract, the board of education adopted rules and regulations, which set forth, among other things, provisions for extra-curricular duty, which are as follows:

'Extra duty. Teachers are to be paid at the rate of \$2.00 per hour for approved extra duty assignments. No guarantee is made of extra duty assignments and they may be declined without prejudice provided an approved substitute can be secured. Pay for extra duty may not begin before 4:15 P.M. on regular school days.'

"Boards of education also frequently establish salary schedules for teachers based on college hours of training, successfully experienced, etc. The teacher's contract is usually issued in the spring soon after the school election in April. The contract states a specific amount to be paid a teacher monthly and sometimes with a provision to adjust the contract to comply with the established salary schedule, provided the teacher does additional college work in the summer between school sessions. In some cases nothing is stated in the original contract to make adjustments for additional college credits earned, but later when the teacher earns such additional credit, the board of education automatically pays additional wages based on the salary schedule. This raises a legal question as to the board's authority to pay an additional salary other than stated in the contract.

"I shall appreciate your advice and official opinion in answer to the following questions:

1. Is there a legal basis for the board of education of a six-director school district for making rules and regulations in contracting with teachers for additional compensation in performing extra-curricular duties

Honorable Haskell Holman

in addition to the annual salary stipulated in the teacher's contract? If not, under what conditions, if any, may the board pay a teacher compensation over and above the amount stipulated in the teacher's contract?

2. Is the board of education of a six-director school district authorized to pay a teacher any amount in excess of the exact salary specified in the teacher's contract, or include in the contract a provision for the payment of a different salary rate, but within the provisions of the established salary schedule, when additional college credits are earned by the teacher, or establish rules and regulations to pay an increased salary to a teacher who earns additional college credits, even though not stipulated in the contract?"

In the past this office has issued numerous opinions on this general subject and has consistently held that a teacher cannot be paid more for the performance of his duties than is specified in his contract of employment. In that connection, we are enclosing copies of the following opinions:

Donald B. Dawson, May 10, 1939;
G. C. Beckham, March 18, 1936;
Richard Chamier, April 23, 1938.

Section 432.070, RSMo 1949, requires all contracts of a school district to be in writing. Section 163.080, RSMo 1949, requires that all contracts for the employment of teachers, among other things, shall specify "the wages per month to be paid." In this connection, your first specific inquiry is whether a school district can pay extra compensation for extracurricular duties based upon rules and regulations of the board.

The contract quoted above from your opinion request provides expressly that the teacher shall "perform such extra-curricular duties as assigned by the principal" for a certain sum per year. Under such a contract, no additional sum can be paid the teacher for the performance of such duties. To do so would be violative of Sections 38(a) and 39(3) of Article III of the Constitution of Missouri, 1945, as held in the enclosed opinions.

The question arises, however, as to what duties the teacher would be expected to perform under this contract as "extra-curricular" duties. An excellent discussion of a teacher's duties is found in *Parrish v. Moss*, 106 N.Y.S. (2d) 577, 584, where it is said:

Honorable Haskell Holman

" * * * The hours of service of its teachers may not necessarily coincide with the hours of classroom instruction, nor is it legally required that the hours fixed be the same for all teachers. The board may authorize the principal or other official in charge of the school to excuse teachers at earlier hours than those contained in the bylaws when their services on a given day are no longer needed. Furthermore, under ordinary circumstances the board, in fixing such laws, is limited to the usual hours of the day. However, I do not hold that there may not be occasions when hours in the evening may be specified if the service can be said to fall fairly within the regular duties of the teacher."

"The hours established in any case must be reasonable. The broad grant of authority to fix "duties" of teachers is not restricted to classroom instruction. Any teaching duty within the scope of the license held by a teacher may properly be imposed. The day in which the concept was held that teaching duty was limited to classroom instruction has long since passed. Children are being trained for citizenship and the inspiration and leadership in such training is the teacher. Of course, it is recognized that any bylaw of a board outlining teachers' duties must stand the test of reasonableness. Any teacher may be expected to take over a study hall; a teacher engaged in instruction in a given area may be expected to devote part of his day to student meetings where supervision of such teacher is, in the opinion of the board, educationally desirable. Teachers in the fields of English and Social Studies and undoubtedly in other areas may be expected to coach plays; physical training teachers may be required to coach both intramural and inter-school athletic teams; teachers may be assigned to supervise educational trips which are properly part of the school curriculum. The band instructor may be required to accompany the band if it leaves the building. These are illustrations of some of the duties which boards of education have clear legal justification to require of their

Honorable Haskell Holman

employees. A board is not required to pay additional compensation for such services. The duty assigned must be within the scope of teachers' duties. Teachers may not be required, for instance, to perform janitor service, police service (traffic duty), school bus driving service, &c. These are not "teaching duties." The board may not impose upon a teacher a duty foreign to the field of instruction for which he is licensed or employed. A board may not, for instance, require a mathematics teacher to coach intramural teams. Where the service is not part of the duties of the teacher, there is nothing to prevent the board from arranging for such extra service and paying for the same in its discretion. * * * There are some activities that are part of instruction, but, by their very nature, may be performed after the close of the regular school session. The athletic program, for instance, in many instances takes place under such circumstances. It has, nevertheless, over the years been always regarded as part of the school curriculum (see Commissioner's Regulations section 155). As has been heretofore stated in departmental publication, "athletic activities are a definite and integral part of the instruction program in physical education." Coaching in athletic sports is teaching. It, therefore, does not follow that because an activity is conducted after regular class hours, it is not part of the regular curriculum."

Those duties, then, which are incidental to the teaching profession must be performed by the teacher under his contract and no other compensation may be allowed therefor.

However, if a teacher is called upon to perform duties foreign to his field and beyond the scope of his contract, a separate agreement for compensation may be entered into between the teacher and the district for the additional duties to be performed. For example, in Joint Consol. School Dist. No. 2 v. Johnson, 166 Kan. 636, 203 P2d 242, some teachers were called to military service. Other teachers to fill the vacancies were unobtainable. It was arranged by the board and teachers that the remaining teachers should take on the work of the teachers called to service in addition to their own work. The board agreed to pay a reasonable amount for the extra work performed. A taxpayer of the district sued the district treasurer on

Honorable Haskell Holman

his bond for paying the teachers for the extra work performed by them. He contended that the teachers were legally obliged to do whatever was reasonably necessary to carry on the schools without additional pay and, thus, that additional pay amounted to a gift, bonus or gratuity, in violation of a constitutional provision similar to the one in Missouri. The court sustained the legality of the payments, saying at P2d 1.c. 245:

" * * * In our opinion the allegation that certain employees performed services over and above those required by the terms of their written contracts, warranted the school board in paying them the amounts which would otherwise have been paid to other teachers under written contracts for those services which the latter class of teachers were unable to perform under the circumstances pleaded, and that the trial court did not err in ruling on the motion for judgment on the defendants' opening statement."

More explicitly, additional payments cannot be made under the teacher's original contract for anything, but if he performs services not encompassed by his contract, a separate agreement may be entered into for those services.

The above answers the first part of your second question, i.e., that the board may not pay a teacher any amount in excess of the exact salary specified in the teacher's contract for services performed under that contract. However, you next inquire as to whether a graduated salary schedule may be included in the contract and you have given as an example the provision for added pay upon completion of additional college hours of training.

In some states, e.g., Indiana (Board of School Trustees v. Moore, 218 Ind. 386, 33 NE2d 114), a salary schedule is required by statute and automatically made a part of the teacher's contract. In others, salary schedules are incorporated into the teacher's contract in the absence of a statute based upon the general authority of the board to fix the compensation of teachers (Fry v. Board of Education, 17 Cal. 2d 753, 112 P2d 229; Ribble v. Hughes, 24 Cal. 2d 437, 150 P2d 455; Heinlein v. Anaheim Union School Dist., 96 Cal. App. 2d 19, 214 P2d 536). Some of the above cases arose out of salary schedule provisions objective in nature, e.g., additional college training, and others on subjective standards. (See, also, Turner v. Keefe, 50 Fed. Supp. 647 (Fla.).)

Section 163.080, RSMo 1949, provides that teachers' contracts shall be construed under the general law of contracts. As long as

Honorable Haskell Holman

the salary schedule is definite and certain and not discriminatory or unreasonable, we perceive no reason why such salary schedule cannot be made a part of the teacher's contract either by being included directly in the contract or incorporated therein by reference. Whatever method is employed, in order to be effective the salary schedule must be made a part of the contract. Rules and regulations of the board establishing a salary schedule and not made a part of the contract would be ineffective.

CONCLUSION

It is the opinion of this office that a school board may not pay a teacher more than is specified in the contract of employment for services encompassed by the contract. The board may make a separate contract with such teacher for other services not included within the scope of the original contract of teaching.

It is the further opinion of this office that a teacher's contract may include a salary schedule, but that such salary schedule in order to be effective must be made a part of the contract.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

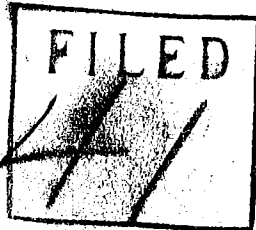
Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml
Encs (3)

COURT REPORTER:
REPORTER:

One-fourth of the compensation allowed to a temporary court reporter, under the provisions of Chapter 485 RSMo Cum. Supp., 1955, is payable out of the state treasury. The state's part of the compensation allowed to a temporary court reporter is in addition to the amount that the state is obligated to pay the regular court reporter.



August 27, 1956

Honorable Haskell Holman
State Auditor
Capitol Building
Jefferson City, Missouri

Dear Mr. Holman:

Reference is made to your request for an official opinion of this office, which request reads as follows:

"It is requested that you furnish this department with an official opinion stating whether or not the State of Missouri is liable for all or part of the compensation authorized a temporary court reporter under the provisions of Section 485.075, House Bill No. 385, Laws of Missouri 1955 (1955 Cumulative Supplement page 1004); and, if so, is said compensation in addition to the compensation of the regular reporter appointed for said circuit or division of said circuit, or should this amount be withheld from the compensation due the regular reporter?"

Section 485.075 RSMo Cum. Supp., 1955, relating to the appointment of a temporary court reporter, in the event of the illness or physical incapacity of the regular reporter, reads as follows:

"In the absence of the official reporter of any circuit court or any division of any circuit court, or of any court of common pleas, or of any court of criminal correction because of illness or physical incapacity to perform his duties, the judge of such court may appoint a temporary reporter, who shall perform the same duties and receive the same compensation as provided for the regular reporter for the time served by the appointee as temporary reporter, to be paid upon certification of the judge making such appointment. No temporary appointment shall continue through more than thirty court days in any calendar year."

Honorable Haskell Holman

It is to be noted that such section provides that the temporary reporter shall "receive the same compensation as provided for the regular reporter for the time served".

Sections 485.060 and 485.065 RSMo Cum. Supp., 1955, provide for the compensation of the regular court reporter as follows:

Sec. 485.060. "The court reporter for a circuit or common pleas court shall receive an annual salary of six thousand dollars, payable in equal monthly installments on the certification of the judge of the court or division in whose court the reporter is employed."

Sec. 485.065. "Three-fourths of the salary of the court reporter shall be paid out of the county treasury and one-fourth out of the state treasury. Where a judicial circuit is composed of more than one county, the county part of the salary shall be divided among the counties and be paid by them proportionately as the population of such county bears to the entire population of the circuit."

Under the authority of the foregoing noted statutory provisions, we are of the opinion that the state is obligated to pay one-fourth of the compensation allowed to a temporary reporter.

You next inquire whether the state's portion of a temporary reporter's compensation is in addition to the compensation allowed the regular reporter for the same period or whether the amount paid to the temporary reporter should be withheld from the compensation provided for the regular reporter. Section 485.060, supra, provides for an annual compensation payable to the regular court reporter. The monthly installments provided for are not contingent upon the actual performance of duties during said month. This is, of course, in accord with the general rule that the right to compensation is an incident of the office and is not dependent upon an exercise of the functions of the office. This rule is stated in the case of *Stratton v. City of Warrensburg*, 167 SW2d 392, 1.c. 396, as follows:

"* * * The true rule is that the right to the compensation attached to an office is an incident to the legal right to the office and not to the exercise of the functions of the office. *Cunio v. Franklin County*, 315 Mo. 405, 285 S.W. 1007, and cases cited."

We are unable to find any provision in Chapter 485 RSMo Cum. Supp., 1955, which would indicate that the appointment of a temporary court reporter would in any way affect the appointment of the regular reporter. Therefore, we are of the opinion that so long as the regular reporter is duly and legally appointed, such reporter

Honorable Haskell Holman

is entitled to receive the compensation provided by law, and that the compensation allowed a temporary reporter would be in addition to that allowed the regular reporter.

CONCLUSION

Therefore, it is the opinion of this office that one-fourth of the compensation allowed to a temporary court reporter under the provisions of Chapter 485 RSMo Cum. Supp., 1955, is payable out of the state treasury.

We are further of the opinion that the state's part of the compensation allowed to a temporary court reporter is in addition to the amount that the state is obligated to pay the regular court reporter.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

Very truly yours,

John M. Dalton

DDG/ld

SCHOOL BONDS:
BUILDING FUND:
INTEREST FUND:

Section 165.110, Mo. Cum. Supp. 1955, provides that the money received from the sale of building bonds should be placed in the building fund, whether the money received in exchange for the bonds is the par value of the bonds, below par, or above par.



September 13, 1956

Honorable Haskell Holman
State Auditor
Jefferson City, Missouri

Dear Mr. Holman:

This is in answer to your request for our opinion on the following question:

"Do you interpret the provisions of Section 165.110, RSMo 1949, to mean that the proceeds from the sale of bonds shall include accrued interest, and to be placed to the credit of the building fund, or should such receipts be credited to the interest fund?"

Thereafter you submitted to us additional facts which were pertinent to the opinion request, supra. They were that the bonds referred to in your opinion request were issued and dated March 1, and began to draw interest the same day. The par value of the bonds was \$750,000.00. On April 21, the same year, a purchaser bought the bonds. He paid, in addition to the \$750,000.00, the sum of \$2,236.10, representing interest that had accrued on said bonds from the date of issue to the date of sale and delivery. This extra \$2,236.10, which was above the par value of the bonds, was credited to the building fund.

There is no authority directly in point upon which to reply in formulating an answer to your particular question. However, we have thoroughly researched the matter and have studied the applicable statutes, and it is our opinion that the money was properly credited to the building fund.

Section 165.110, paragraph 3, Mo. Cum. Supp. 1955, provides in part as follows:

"3. * * * All money derived * * * from sale of bonds, shall be placed to the credit of the building fund. * * *"

Section 108.180, RSMo 1949, provides in part as follows:

"When any bonds shall have been issued * * * the proceeds from the sale thereof * * * shall be kept separate and apart from all other funds of such governmental unit, * * * provided, that

Honorable Haskell Holman

in no case shall the proceeds derived from the sale of any such bonds be used for any purpose other than that for which such bonds were issued, * * *."

It appears to be the intention of the legislature that any and all money which comes to the school district as a direct result of, and in connection with the sale of school bonds, shall be considered as money derived from the sale of bonds and as a part of the proceeds of the sale of the bonds. It is to be credited to the building fund and used only for the purposes for which the bonds were issued.

Generally, "proceeds from the sale of bonds" are regarded as including all moneys derived from the sale. When a purchaser buys bonds, whether he pays par, below par, or above par for the bonds, the money he gives in exchange for the bonds is all "proceeds from the sale of bonds." Thus, in our case, this extra \$2,236.10, which was above the par value of the bonds, was properly credited to the building fund as it was a part of the "proceeds from the sale of bonds." It was merely part of the purchase price of the bonds. The purchaser bought the bonds for a total price, which in our case, reflected the accrued interest. Other jurisdictions have reached a similar result.

In an opinion written by E. W. Anderson, Assistant Attorney General of the State of Washington, to the Honorable C. W. Clausen, Supervisor of Municipal Corporations, Olympia, Washington, on August 12, 1927, it was held that a premium received by a school district from the purchaser of certain school bonds, in connection with the purchase of those bonds, was a part of the proceeds derived from the sale of the bonds and should be credited to the building fund. There was a statute involved which is very similar to the present Missouri statute, and which provided that the county treasurer should place all money derived from the sale of bonds to the credit of the building fund of the district. The Attorney General of Washington considered the premium as being money derived from the sale of bonds and as a result thereof--a part of the building fund.

In *City of Oakland v. Williams*, 107 Cal. App. 340, 290 P. 1044 (1930), the petitioners sought to compel the respondents to transfer to the Oakland Harbor Improvement Fund from the Oakland Harbor Interest Fund the amount of the premiums realized in the sale of Oakland Harbor Improvement bonds. A statute provided for the issuance and sale of the bonds and required the proceeds from the sale of the bonds to be placed in the municipal treasury to the credit of the proper fund, and to be used exclusively for the purposes and objects mentioned in the ordinance authorizing the bond issue. The court concluded that when bonds are sold for more than their par value, the entire purchase price, including the premiums,

Honorable Haskell Holman

constitutes the proceeds from the sale of the bonds. After making a survey of the applicable statutes, the court, at page 1046, stated:

"We are satisfied that the language of the Act of 1901 above quoted clearly and unequivocally requires the proceeds from the sale of bonds issued under it, including any premium, to be placed in the construction fund and not to be used for interest and redemption payments at least until the purposes and objects for which the bonds were issued have been fully accomplished."

From the above authority, it is our opinion that the money herein involved was properly credited to the building fund.

CONCLUSION

It is therefore the opinion of this office that Section 165.110 Mo. Cum. Supp. 1955, provides that the money received from the sale of building bonds should be placed in the building fund; and this is so whether the money received in exchange for the bonds is the par value of the bonds, below par, or above par.

The foregoing opinion, which I hereby approve, was prepared by my Assistants, Richard Dahms and George E. Schaaf.

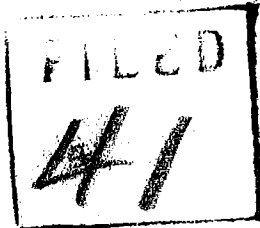
Yours very truly,

John M. Dalton
Attorney General

RD/b1/sm
GES/b1

COURT REPORTER:
REPORTER:

The state's portion of the compensation due a temporary court reporter should not be computed on a basis of so much per day, but should be computed on the same basis as the compensation authorized the regular court reporter.



November 28, 1956

Honorable Haskell Holman
State Auditor
Jefferson City, Missouri

Dear Sir:

Under date of October 27, 1956, this office issued an official opinion holding that the state is obligated to pay one-fourth of the compensation allowed to a temporary court reporter. This opinion was directed to your office. You now inquire as to the proper method of computing the state's portion of the compensation allowed to a temporary court reporter.

The certification of services of a temporary court reporter for the circuit court of Jackson County, Division No. 2, submitted with your opinion request reads, in part, as follows:

"For reporting services as temporary reporter in Division No. 2 of the Circuit Court of Jackson County, Missouri, at Kansas City (as provided in Sections 485.060, 485.065 and 485.075 R.S.Mo. 1949).

"30 days at \$5.77.....\$173.10."

The certification further shows that the temporary court reporter served on the following dates during the months of March and April, 1956: March 5, 6, 7, 8, 9, 13, 15, 16, 19, 20, 21, 22, 23, 26, 27, 29 and 30; April 2, 3, 4, 5, 6, 10, 11, 12, 13, 16, 17, 19 and 24.

We assume for the purpose of this opinion only, and the question herein asked, that the appointment of the temporary court reporter, as indicated by the certification, was on a daily basis, and do not mean to infer or imply that the reasoning contained in this opinion would necessarily be applicable if the appointment was for a period or periods longer than a day.

Section 485.075 RSMo Cum. Supp. 1955, provides that a temporary court reporter shall receive the same compensation as provided for the regular reporter. Said section more fully provides as follows:

Honorable Haskell Holman

"In the absence of the official reporter of any circuit court or any division of any circuit court, or of any court of common pleas, or of any court of criminal correction because of illness or physical incapacity to perform his duties, the judge of such court may appoint a temporary reporter, who shall perform the same duties and receive the same compensation as provided for the regular reporter for the time served by the appointee as temporary reporter, to be paid upon certification of the judge making such appointment. No temporary appointment shall continue through more than thirty court days in any calendar year."

Section 485.060, RSMo Cum. Supp. 1955, provides for the compensation of the regular court reporter as follows:

"The court reporter for a circuit or common pleas court shall receive an annual salary of six thousand dollars, payable in equal monthly installments on the certification of the judge of the court or division in whose court the reporter is employed."

It is apparent to us that the daily rate (due from the state) indicated on the certification was computed by dividing the number of days in the year, exclusive of Saturdays and Sundays, into the annual salary of \$6,000 allowed the regular court reporter. It is our opinion that such is not the correct method of computing the compensation due a temporary court reporter. The difficulty with such computation is that the regular court reporter is not paid at a daily rate or upon a five-day week, but is allowed an annual salary payable in equal monthly installments of \$500. Nothing is stated in the statutes relating to his compensation that said salary is dependent upon the days of service. Under such circumstances the general rule prevails, that the right to compensation is incident to the legal right to the office and not to the exercise of the functions of the office. *Coleman v. Kansas City*, 173 S.W.(2d) 572, 351 Mo. 254; *Stratton v. City of Warrensburg*, 167 S.W.(2d) 392, 237 Mo. App. 280. Since a temporary court reporter is entitled to the same compensation as the regular reporter how can it be said that the temporary reporter's compensation should be computed on a daily basis when the regular reporter is not so compensated? It is a familiar rule of statutory construction that statutes providing compensation in a particular mode or manner must be strictly construed against the officer. *Nodaway v. Kidder*, 129 S.W.(2d) 857, 344 Mo. 795. With such rule in mind we are of the opinion that the correct method of computing the compensation of a temporary court reporter would be to multiply \$500 (the amount payable monthly to the regular court reporter) by the fraction of the month covered by the temporary appointment.

Honorable Haskell Holman

More specifically in the instant case the certification shows the appointment of a temporary court reporter for seventeen days during the month of March, 1956. Therefore \$500 times 17/31 would, we believe, result in the correct compensation of the temporary reporter. This method, of course, places the temporary reporter on the same basis as the regular reporter which, we believe, is contemplated by the statutes.

CONCLUSION

Therefore, in the premises, the state's portion of the compensation due a temporary court reporter should not be computed on a basis of so much per day, but should be computed on the same basis as compensation authorized the regular court reporter.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Donal D. Guffey.

Very truly yours,

John M. Dalton
Attorney General

DDG/ld

MISSOURI REAL
ESTATE COMMISSION:

A real estate licensee does not jeopardize his license under Section 339.100, Clause 11, RSMo 1949, when he sells houses of a manufacturer, even though that manufacturer is conducting contests, and presenting as prizes, free houses and lots.



December 7, 1956

Honorable J. W. Hobbs, Secretary
Missouri Real Estate Commission
222 Monroe Street
Jefferson City, Missouri

Dear Mr. Hobbs:

This is in answer to your opinion request addressed to this office, dated September 20, 1956, on the following question:

United States Steel Homes, Inc., a manufacturer of prefabricated houses, is currently conducting a nation-wide sales promotion campaign in connection with the construction of subdivisions of their product. The sales promotion campaign works as follows: A builder constructs a subdivision using United States Steel Homes, Inc., houses. One lot and house in that subdivision is set aside by the builder and is given away free by United States Steel Homes, Inc., to a person who is considered by United States Steel Homes, Inc., to have submitted the best entry on what they like best about United States Steel Homes, Inc., houses and why. Will a Missouri real estate licensee be violating Section 339.100, Clause 11, RSMo 1949, if he sells for the builder other houses in that subdivision?

Section 339.100, RSMo 1949, provides in part as follows:

"The commission may upon its own motion, and shall upon written complaint filed by any person, investigate the business transactions of any real estate broker of real

Honorable J. W. Hobbs

estate salesman and shall have the power to suspend or revoke any license obtained by false or fraudulent representation or if the licensee is performing or attempting to perform any of the following acts or is deemed to be guilty of:

* * * * *

"(11) Soliciting, selling, or offering for sale real property by offering free lots, or conducting lotteries, or contests, or offering prizes for the purpose of influencing a purchaser or prospective purchaser of real property."

The above section gives to the Missouri Real Estate Commission the power to revoke or suspend any license if the licensee is found guilty of performing any of the acts set out in any of the eleven clauses.

In Robinson vs. Missouri Real Estate Commission, 280 S.W. (2d) 138 (1955), the court stated therein that:

"As we have stated the Commission is authorized to revoke a broker's license if he is found guilty of any of the eleven acts set out in Section 10, Laws of 1941, pp. 428-429. * * *" (Sec. 10, Laws 1941, pp. 428-429 is the same as Section 339.100, RSMo 1949.)

Although this case is not in point on the facts, it does point up the fact that for the licensee's license to be revoked under clause 11, Section 339.100, supra, it must be the licensee himself or his salesman acting with his knowledge and consent who performs the acts prohibited therein for the purpose prohibited.

Looking specifically at clause 11 of Section 339.100, supra, we find that a violation of this clause must consist of three elements. A licensee to violate clause 11 of Section 339.100, must:

(1) Solicit, sell, or offer for sale, real property;

Honorable J. W. Hobbs

- (2) By offering free lots, conducting lotteries, or contests, or offering prizes;
- (3) And the purpose for which those free lots or prizes are given, or the lotteries or contests conducted, must be to influence a purchaser, or prospective purchaser, of real property.

All of the above three elements must be present and must have been performed by the licensee before his license can be revoked or suspended by the Commission for violation of Section 339.100, Clause 11, supra. Any two elements without the third will not be enough to constitute a violation of that statute.

In answer to your opinion request it is the opinion of this office that a licensee will not be risking suspension or revocation of his license for violation of Section 339.100, Clause 11, supra, when he sells a house or houses in a subdivision in which is located a free house being offered as the prize in a contest conducted by United States Steel Homes, Inc. The contest here is being sponsored by United States Steel Homes, Inc. That corporation is bearing all the financial expense and carrying out all the administrative details of the contest. That corporation selects the winner and sets out the rules and requirements by which the winner is selected. No licensee is involved in anyway. To be sure, real estate licensees may be benefited to a certain extent by the advertising that arises in connection with the sales campaign and the contest. However, it cannot be said that a licensee is performing the acts prohibited by Section 339.100, Clause 11, and is subject to having his license revoked or suspended merely because he sells a house in a subdivision wherein a house, to be given away in a contest, is located.

A mere reaping of the benefits resulting to him from the contest being conducted by United States Steel Homes, Inc., is not jeopardizing the licensee's license.

CONCLUSION

It is the opinion of this office that for a real estate licensee to have his license revoked or suspended by the Missouri Real Estate Commission for violation of Section 339.100,

Honorable J. W. Hobbs

Clause 11, RSMo 1949, the licensee himself must be guilty of performing the act or acts prohibited therein. In the United States Steel Homes, Inc., contest, no licensee is involved.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Richard W. Dahms.

Very truly yours,

John M. Dalton
Attorney General

RWD:bi:rw:hw

MISSOURI REAL ESTATE
COMMISSION:

Licensees selling real estate in connection with which a contest is being held are not jeopardizing their licenses if contest is not for the purpose of influencing purchasers or prospective purchasers of real property.



December 7, 1956

Honorable J. W. Hobbs, Secretary
Missouri Real Estate Commission
222 Monroe Street
Jefferson City, Missouri

Dear Mr. Hobbs:

This is in answer to your opinion request addressed to this office, dated September 17, 1956, on the following question:

The Stanton Building Company is a builder of subdivisions in Kansas City, Missouri. The James H. Stanton Company Realtors sell homes which are built by Stanton Building Company. The Stanton Building Company advertises extensively through radio, television, and newspapers, and in order to determine the relative value of the various advertising media used, they have the public fill out certain forms as they pass through the model homes in each project. The purpose of these forms is for the determination by the Stanton Building Company as to what advertising media will provide them with the best results in the future. It is difficult to get the public to cooperate in filling out these forms, so an inducement in the form of a drawing, with a radio as a prize is offered. The forms are placed in a box and one drawn therefrom, and the name appearing thereon is the winner of the radio for that period.

Is the giving away of a radio for the purpose of inducing the general public to divulge information which they would not normally divulge to the building and selling corporations, a violation of Section

Honorable J. W. Hobbs

339.100, Clause 11, RSMo.1949, insofar as the real estate company and the sales people who actually sell the houses in the subdivision are concerned?

We have recently sent you a copy of an opinion of this office which was rendered upon your request concerning a contest being held by United States Steel Homes, Inc., and the provisions of Section 339.100, Clause 11, RSMo 1949, and the applicability of the provisions of that section to licensees selling homes involved in the contest. That opinion held that the licensee himself must be performing the prohibited acts before his license could be revoked or suspended by the Missouri Real Estate Commission. That opinion also set out the three elements necessary to constitute a violation of Clause 11, Section 339.100, supra. First, there must be a soliciting, selling or offering for sale real property by the licensee. Second, there must be an offering of free lots or the conducting of lotteries or contests or the offering of prizes by licensee. Third, the purpose for which the licensee performs the above acts must be to influence a purchaser or prospective purchaser of real property.

The information in your letter of October 17, 1956, concerning the Stanton Building Company and James H. Stanton Realtors states that the Stanton Building Company is the one handling the details of the contest. However, it is apparent that the Stanton Building Company and the James H. Stanton Realtors are closely connected and that the salesmen of the James H. Stanton Realtors assist in the contest in some manner as they place their name at the bottom of each "Statistical Report on Advertising."

Also, there are two inquiries on the form which are unrelated to the purpose for which the Stanton Building Company states the forms are designed. These are "I (do) (do not) own my own home," and "I (am) (am not) interested in buying one of your homes." These inquiries are pointed toward the sale of Stanton Homes and could be called the soliciting of sale of real property. The plan probably is that if a person should answer that he is interested in buying a Stanton Home by making the appropriate indication on the form, a salesman of the James H. Stanton Company, Realtors would contact that person and attempt to complete a sale.

Even though we do have licensees participating in the conducting of a contest in connection with which the sale of real

Honorable J. W. Hobbs

property is solicited, the licensees so participating are not violating Section 339.100, Clause 11, supra. The reason is that the purpose of conducting the contests is not for the influencing of purchasers or prospective purchasers of real property. There is nothing involved in the contest which would in anyway influence, induce or be incentive for a person to purchase a Stanton home.

CONCLUSION

It is the opinion of this office that the offering of a radio through weekly or biweekly drawings to induce persons passing through model homes to fill out a statistical report on advertising for the company erecting the homes is not a violation of Section 339.100, Clause 11, RSMo 1949, and the licenses of licensees selling homes are not in jeopardy. The purpose of the contest is not to influence purchasers or prospective purchasers of real property. We are not at this time passing upon the legality or illegality of the acts of the Stanton Building Company and the James H. Stanton Company Realtors in carrying out the above described procedure in the light of other laws of the State of Missouri. We are only looking at these acts in the light of the real estate license statutes to determine if said acts constitute a violation of the above mentioned real estate license laws.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard W. Dahms.

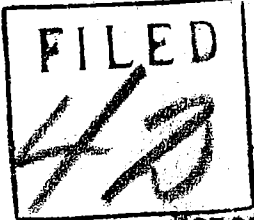
Very truly yours,

John M. Dalton
Attorney General

RWD:bi:hw

**SUPPLEMENTAL UNEMPLOYMENT
BENEFIT PLAN:**

(1) The receipt of supplemental benefits under the Ford Motor Company or General Motors Corporation Supplemental Unemployment Benefit Plan does not prevent the receipt of state unemployment benefits to an individual while unemployed. (2) The amounts which are set aside to pay supplemental benefits under this plan are not taxable as wages under Section 288.090, RSMo 1955, Supp.



June 21, 1956

Honorable Raymond B. Hopfinger
Member, House of Representatives
5916 Berkeley Drive
Berkeley 21, Missouri

Dear Sir:

This will acknowledge receipt of your opinion request of June 1, 1956, in which you ask the following:

"We wish to request an official ruling by your office with regard to two questions relating to supplemental benefit plans recently negotiated by the A.A.W. with General Motors Corp. and the Ford Motor Co.

"The questions involved are:

1. Does the receipt of supplemental benefits under these plans prevent the receipt of state unemployment benefits to an individual while unemployed?
2. Are the amounts which are set aside to pay supplemental benefits under these plans reportable for unemployment tax purposes?

"As you probably know, these plans are scheduled to become effective as of June 1, 1956. Therefore your earliest possible attention to the matter will be greatly appreciated."

Briefly, the Supplemental Unemployment Benefit Plan (hereinafter referred to as the Plan) may be described as one designed to supplement the state unemployment payments. It contemplates the establishment of a trust fund or funds into which the Company will contribute five cents per employee hour until such time as the Plan is fully funded. Thereafter, only such contributions will be made by the Company as are necessary to maintain the solvency of the fund. The above is the sole obligation of the Company. The expressed purpose of the Plan is to supplement

Honorable Raymond B. Hepfinger

state unemployment benefits. Beginning June 1, 1956, unemployed workers of the Company will be paid benefits in addition to state unemployment benefits by the trustee of the fund in exchange for certain "credit units" accumulated by such employees while employed by the Company. The rate of exchange will depend on the seniority of the particular employee and the relative value of the assets of the fund. Thusly, when added to the amount of state benefits will total sixty-five per cent of the workers normal after-tax straight time wage for four weeks and sixty per cent thereafter for a total period not to exceed twenty-six weeks, the exact number depending upon the length of employment. The above is qualified to the extent that the worker will receive no payment unless the amount to which he is entitled is at least two dollars and the largest supplemental payment he may receive is twenty-five dollars. It is further provided that in order for a worker to receive a supplemental payment under the Plan with respect to any week he must meet the eligibility of the conditions of the state unemployment compensation system and must have actually received a benefit check under such state system with respect to such week.

The questions immediately arising are those submitted in the opinion request and the solution thereof depends upon the provisions and construction thereof of the state Unemployment Compensation Laws.

The policy of the Missouri Employment Security Law (hereinafter referred to as the "Missouri Act") is set forth in Section 288.020, Cum. Supp. 1955. Said section reads as follows:

"1. As a guide to the interpretation and application of this law, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to health, morals, and welfare of the people of this state resulting in a public calamity. The legislature, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this state require the enactment of this measure, under the police powers of the state, for compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.

"2. This law shall be liberally construed to accomplish its purpose to promote employment security both by increasing opportunities for

Honorable Raymond B. Hopfinger

jobs through the maintenance of a system of public employment offices and by providing for the payment of compensation to individuals in respect to their unemployment."

The features of the Plan appear to be quite in keeping with the afore-mentioned public policy. Certainly such supplemented benefits are no less for the public good and the general welfare of the people of this state when voluntarily provided by contract than when provided by the state by virtue of the statute.

The conditions of eligibility to receive unemployment benefits are set forth in Section 288.040, Cum. Supp. 1955. The only condition under which it is questionable that an individual drawing benefits under the plan might not comply with is set forth in subsection 3 of this section and reads as follows:

"1. A claimant who is unemployed and has been determined to be an insured worker shall be eligible for benefits for any week only if the deputy finds that

* * * * *

"(3) Prior to the first week of a period of total or partial unemployment for which he claims benefits he has been totally or partially unemployed for a waiting period of one week. No more than one waiting week will be required in any benefit year. No week shall be counted as a week of total or partial unemployment for the purposes of this subsection unless it occurs within the benefit year which includes the week with respect to which he claims benefits;"

It is apparent from reading this section that eligibility depends upon a status of unemployment.

"Totally unemployed" is defined in paragraph 24 of Section 288.030, Cum. Supp. 1955, as follows:

"24. (1) An individual shall be deemed 'totally unemployed' in any week during which he performs no services and with respect to which no wages are payable to him. * * *"

A construction of this paragraph will determine the questions with which we are concerned since said paragraph sets forth the conditions under which an individual shall be deemed unemployed. Notice that these conditions, with respect to any week, are (1) non-performance of services, and (2) no claim for wages.

Honorable Raymond B. Hopfinger

The conditions will be treated separately and the opinion will deal first with the term "services."

In defining the term "services", the Washington State Supreme Court in *Skrivanich v. Davis*, 29 Wn. (2d) 150, at page 161 approved the following definition of services which was adopted by the Supreme Court of Utah in *Creameries of America v. Industrial Commission*, 98 Utah 571, 102 P. (2d) 300, i.e. 304 of the P. Reporter:

"Section 19(p) defines 'wages' as 'all remuneration payable for personal services, including commission and bonuses and the cash value of all remuneration payable in any medium other than cash.' The terms 'services' and 'personal service' used in defining 'wages' are not specifically defined in the Act. In ordinary usage the term 'services' has a rather broad and general meaning. It includes generally any act performed for the benefit of another under some arrangement or agreement whereby such act was to have been performed. The general definition of 'service' as given in Webster's New International Dictionary is 'performance of labor for the benefit of another'; 'Act or instance of helping, or benefiting'. The term 'personal service' indicates that the 'act' done for the benefit of another is done personally by a particular individual."

Looking back for a moment at the Plan, it provides for benefits to eligible unemployed workers as a supplement to state unemployment compensation. Provision is made for a trustee to be custodian of the fund which is composed of contributions at a rate of five cents per hour for which the company has paid its employees. The employer is the sole contributor to the trust fund and the trustee individually administers the fund. The moneys in the fund never revert to the employer, and the employee has no vested right, his right thereto being dependent on the occurrence of a future uncertain event.

In view of the plan itself, and in the light of the language of the *Creameries of America Case*, supra, it appears that a recipient of benefits under the Plan would be performing no services since there is no employer-employee relationship and, further, because payment is made from a trust fund by a trustee and not from an employer.

The term "wages" is defined in paragraph 25 of Section 288.030, supra, as follows:

Honorable Raymond B. Hopfinger

"25. 'Wages' means all remuneration payable or paid, for personal services including commissions and bonuses and the cash value of all remuneration paid in any medium other than cash. Vacation pay and holiday pay shall be considered as wages for the week with respect to which it is payable. * * *"

It is obvious from the definition of "wages" that the key word used therein is "remuneration", and that a construction thereof is necessary in determining what are wages. For a construction of the term "remuneration", see the case of Pendleton Unemployment Compensation Case, 167 Pa. Super. Ct. 256, 75 A. (2d) 3, where the Superior Court of Pennsylvania stated, 1.c. 5 of the A. Reporter:

"It is safe to assert that pension payments are not wages within the meaning of the Law, sec. 4 (x), 43 P.S. 753, and that their receipt will not disqualify an employee who meets the other requirements of the Law. Nor are payments made by an employer to a pension fund regarded as wages. Law, sec. 4(x) (2) (A). The purpose of the unemployment legislation is 'the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own': Law, sec. 3, 43 P.S. 752. By it the Legislature seeks to prevent 'the spread of indigency', but an employee need not be indigent to secure the benefits provided by the Law. If he meets the requirement of the Law he is entitled to compensation even though he has other resources and from them receives income adequate for his needs; e.g., interest on saving accounts, mortgages, United States bonds, or rent for real estate owned by him. The purpose of a pension plan is 'to pay additional compensation for services rendered in the past', Kline v. State Employees Retirement Board, 373 Pa. 79, 85, 44 A (2) 267. However, it is not remuneration within sec. 4(u), 43 P.S. 753, since the pensioner performs no service during the period covered by the pension payments."

We are unable to see in view of the above quotation how the receipt of benefits under the Plan can be called "remuneration" since the recipient of such benefits would be performing no services during the period that such benefits are received.

Honorable Raymond B. Hopfinger

Another case construing the term "remuneration" is Bartholf v. Board of Review, Div. of Employment Security, 36 N. J. Super. 349, where the appellate court of New Jersey stated, l.c. 359:

"* * * the act places the status of wages only on those monies which represent remuneration for services rendered and which are paid for employment rather than because of employment."

Under the authority of this case, only the consideration paid for employment and not because of employment, constitute wages. Applying such a definition to the term "wages" with reference to "remuneration", the receipt of benefits under the plan would not constitute wages since the benefits would not be paid for employment.

The foregoing conclusion that such benefit payments do not constitute wages necessarily disposes of both questions in the opinion request since, with respect to the second question, the employer is not liable for employment tax except on wages. Insofar as the determination of the second question is concerned, such is further supported by a ruling by the Commissioner of Internal Revenue, 5 C.C.H. P. 52303, Section 6470, that payments received by laid-off employees from a particular company-finance Supplemental Unemployment Benefit Fund Plan are not wages subject to withholding for income or employment tax purposes.

We conclude, then, that a recipient under the Plan would be neither performing services since, the recipient being unemployed, there is no employer-employee relationship and further because benefits are paid by a trustee and not an employer, nor receiving "wages" since "wages" is defined as "remuneration" payable or paid and, as pointed out, "remuneration" is consideration for employment and not because of employment, or stated differently, receipt of such benefits is not remuneration since the recipient performs no services during the period of receipt of such benefits.

CONCLUSION

It is therefore the opinion of this office that:

(1) The receipt of supplemental benefits under the Ford Motor Company or General Motors Corporation Supplemental Unemployment Benefit Plan does not prevent the receipt of state unemployment benefits to an individual while unemployed.

Honorable Raymond B. Hopfinger

(2) The amounts which are set aside to pay supplemental benefits under this plan are not taxable as wages under Section 288.090, RSMo 1955, Supp.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Harold L. Henry.

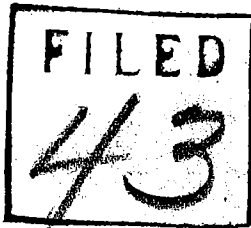
Yours very truly,

JOHN M. DALTON
Attorney General

HLH/b1

MISSOURI HIGHWAY COMMISSION:
PROFESSIONAL ENGINEERS AND
SURVEYORS:

Professional engineers not registered as land surveyors cannot make surveys for said Commission. Professional engineers employed by said Commission may make surveys for Commission without necessity of registering as land surveyor.



May 22, 1956

Honorable Robert L. Hyder
Chief Counsel, State Highway Department
Jefferson City, Missouri

Dear Mr. Hyder:

This will acknowledge receipt of your request for an opinion which reads in part:

* * * * *

"(1) May a registered professional engineer registered in accordance with present laws of Missouri make land surveys and the surveys required for the establishment of roads in the State Highway system?

"(2) May registered professional engineers employed by the State Highway Commission make surveys and file same as directed by Section 227.050, MoRS 1949, without qualifying as a land surveyor as contemplated by Chapter 344, MoRS Cum. Supp. 1955?"

In answering your first request we shall assume that the engineer referred to therein is not an employee of the Missouri State Highway Commission, in view of your second request dealing specifically with one in your employment.

Sections 227.040-050, MoRS 1949, authorize the Missouri State Highway Commission to make surveys, plans, specifications and read:

"227.040. The engineer shall proceed to cause surveys to be made of the state highway system as designated in section 227.020, and to prepare detail plans and specifications for each part thereof as soon as practicable; provided, however,

Honorable Robert L. Hyder

that wherever surveys have heretofore been made, it shall be the duty of the engineer, when practicable, to adopt and utilize such surveys, together with plans and specifications if any have been made by the highway department."

"227.050. The engineer shall, as soon as practicable, submit to the commission in writing his recommendations as to detail plans, width of right of way and surfaced roadway and type and character of construction for each county, and at the same time furnish a copy thereof to the county clerk for public information. The commission may approve, disapprove, modify or amend the proposals so recommended, and the action of the commission thereon shall be the action of the department on such subject, and shall not be modified or disturbed except by subsequent action of the commission."

Prior to the enactment of Chapter 344, MoRS Cum. Supp. 1955, by the 68th General Assembly of the State of Missouri there was no statutory requirement for registration of land surveyors. Certainly the General Assembly of the State of Missouri in enacting such law had in mind all the provisions of the chapter and law dealing with the registration of architects and professional engineers. *Smith vs. Pettis County*, 136 S.W.(2d) 282; *Barnidge vs. U.S.* 101 Fed.(2d) 295; *Howlett vs. Social Security Commission*, 149 S.W.(2d) 806, 347 Mo. 784.

In such case if the General Assembly had intended to make an exception thereto the reasonable deduction would be that the General Assembly would specifically have made such exceptions without the necessity of implying same.

Section 344.020, MoRS Cum. Supp. 1955, makes it unlawful for anyone to practice, offer to practice, or engage in the practice of land surveying without first registering as a land surveyor with the State Board of Architects and Professional Engineers.

Section 344.040, MoRS Cum. Supp. 1955, provides that any person able to show to the satisfaction of the professional engineering division of the State Board of Registration for Architects and Professional Engineers, that he has had six or more active years of land surveying or is possessed of a degree in civil engineering from an accredited college or university and passes a written examination,

Honorable Robert L. Hyder

shall be eligible to register as a land surveyor. Said provision further provides that two years of acceptable work in an accredited college shall, for the purpose of determining land surveying experience, be equivalent to two years in land surveying.

Sections 344.050 and 344.060, MoRS Cum. Supp. 1955 provide that certain duly qualified and acting county surveyors and other persons during certain times and under certain conditions may be licensed as a land surveyor without the necessity of an examination.

Under Section 344.110 MoRS Cum. Supp. 1955, every registered land surveyor is required to procure a seal approved by the professional engineering division of said Board of Architects and Professional Engineers and affix his seal to all maps, plans, surveys and other documents before delivery or filing same of record.

Furthermore, Section 344.120, MoRS Cum. Supp. 1955, makes it unlawful for any recorder of deeds or clerk to file any such records or documents not having the seal affixed thereto and anyone violating said section becomes guilty of a misdemeanor and the penalty for such violation is set forth in Section 344.130 MoRS Cum. Supp. 1955.

We are inclined to construe the law as hereinabove set forth to mean that subsequent to Chapter 344, supra, becoming effective no registered professional engineer may make land surveys required for the establishment of roads in the state highway system, unless he qualify as a land surveyor provided for therein and also is registered as such with the State Board of Registration for Architects and Professional Engineers.

Our answer to your second inquiry is in the affirmative, we so hold by reason of a well-established rule of statutory construction that we consider applicable in the instant case which is, that the state is not to be considered as coming within the purview of a statute, however general and comprehensive the language may be, unless expressly named therein or included by necessary implication.

This department under date of September 27, 1945, rendered an opinion to Honorable W. R. Painter, President of Board of Managers, State Eleemosynary Institutions, a copy of which we are enclosing, holding that a full time plumber employed by State Hospital No. 2 at St. Joseph, Missouri, is exempt from the St. Joseph ordinance requiring a license for all plumbers or journeymen plumbers. This conclusion was reached by reason of the fact the Board of Managers and Superintendent of each institution are vested with very broad and general powers to manage and control all eleemosynary institutions

Honorable Robert E. Hyder

and that the legislative intent was that such authority was to be exercised without interference with city ordinances.

On June 19, 1953, another opinion was written to Mr. Paul Renz, Superintendent of Farms, Missouri State Penitentiary, a copy of which we are enclosing, holding that the Missouri State Penitentiary is not required to cook the garbage it feeds to swine owned by the state and fed on state farms, under a new law requiring a permit from the Department of Agriculture, State of Missouri, prior to feeding said garbage to said swine and further requiring such garbage to be cooked. There are numerous authorities cited and quoted in said opinions to support the position taken herein.

The Missouri State Highway Commission is vested with very broad and general powers over the supervision and control of highways in this state and therefore the same rule applied therein is applicable to the Missouri State Highway Commission

Under Section 29-34, inclusive, Article IV, Constitution of Missouri, the Highway Commission has full charge of the highways in the state. See also Section 227.030, MoRS 1949, wherein the General Assembly has vested in said Highway Commission general supervision over said highways and directed said Commission to take whatever necessary steps to cause said highway system to be constructed at the earliest possible date, and further to provide for proper maintenance of said highway system, make rules and regulations for proper management and conduct of said work. That the Commission is further vested with power and authority to acquire and supply tools, machinery, supplies and materials and to pay for engineering, preparation of plans and specifications, cost of advertising, engineering supervision and contingencies in connection therewith and maintenance of the state highway system. Last, but not least, said Commission shall have the power to make all final decisions affecting said work and regulations it may deem necessary for the proper management and conduct of said work.

Said Highway Commission not only has the aforesaid authority but is vested with considerable similar authority under Chapter 226 and 227, MoRS 1949.

In view of the foregoing as stated, we are of the opinion that a registered professional engineer, employed by the Highway Commission, may make surveys and file same as directed by virtue of Section 227.050, supra, without qualifying as a land surveyor.

Honorable Robert L. Hyder

CONCLUSION

It is the opinion of this department that:

(1) A registered professional engineer registered in accordance with Chapter 327, MoRS 1949, and amendments thereto, who is not registered as a land surveyor under Chapter 344 MoRS Cum. Supp. 1955, cannot make land surveys and the surveys required for the establishment of roads in the State Highway System.

(2) It is the further opinion of this department that registered professional engineers employed by the Missouri State Highway Commission may make surveys and file same as directed by Section 227.050, supra, without qualifying and registering as a land surveyor as contemplated by the provisions of Chapter 344, MoRS Cum. Supp. 1955.

The foregoing opinion which I hereby approve was prepared by my assistant, Mr. Aubrey R. Hammett.

Yours very truly,

ARH:mw

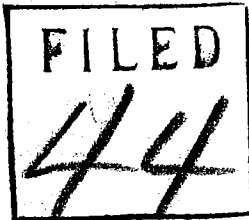
John M. Dalton
Attorney General

Enclosures(2) Opinions.

To: W. R. Painter
9-27-45

Paul V. Renz
6-19-53

TOWNSHIP ORGANIZATION
COUNTIES:
COUNTY HIGHWAY ENGINEER:
ROADS:



1. In township organization county the county court must have approval of county highway engineer in establishing or changing a road.
2. In township organization county the county court must have approval of county highway engineer in vacating a road.

June 25, 1956

Honorable Richard H. Ichord
Representative, Texas County
Houston, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"It would be greatly appreciated if you would render me an opinion as to the construction and application of Section 228.070 Mo. Revised Statutes as amended 1949.

"Section 228.070 reads as follows:

" 'No County Court shall order a road established or changed until such proposed road or change has been examined and approved by the county highway engineer.'

"The question involved is whether the above section applies to counties with township organization; i.e., whether in such a county the county court must have the approval of the county engineer in establishing or changing a road; and also there is the question as to whether the word 'changed' covers the vacation of a road; i.e., in vacating a road would the county court have to have the approval of the engineer. Section 228.110 deals with the vacation of a road."

We assume that your inquiry does not relate to counties of class 1 or 2 but to those of class 3 or 4. Section 61.220 RSMo 1949, which applies to counties of these latter classes, reads as follows:

"The county highway engineer shall have direct supervision over all public roads of the county, and over the road overseers and of the expenditure of all county and district funds made by the road overseers of the county.

Honorable Richard H. Ichord

He shall also have the supervision over the construction and maintenance of all roads, culverts and bridges. No county court shall order a road established or changed until said proposed road or proposed change has been examined and approved by the county highway engineer. No county court shall issue warrants in payment for road work or for any other expenditure by road overseers, or in payment for work done under contract, until the claim therefor shall have been examined and approved by the county highway engineer."

It will be noted that the above states that the county highway engineer "shall have direct supervision over all public roads of the county, and over the road overseers"

We also direct attention to Section 231.150 RSMo 1949, which reads:

"All road laws of this state shall apply to counties under township organization, unless by their terms limited to counties not under township organization, or in conflict with the provisions of this law."

We also direct attention to Section 231.310 RSMo 1949, which reads:

"It shall be lawful for the county court of any county upon the application of the township board of directors, to empower and authorize the county highway engineer of said county, under the direction of the township board of such township, to survey, locate and plat the public highways of such township; and when such plat shall have been completed and approved by the township board, it shall be filed in the office of the township clerk, together with the minutes and report of such survey, to be kept by such township clerk as a part of his official records, the expenses of such proceeding to be paid out of the road fund of the

Honorable Richard H. Ichord

township. The said plat, minutes and reports, or a certified copy of the same, over the hand and seal of the township clerk, shall be prima facie evidence that the road or roads therein contained or described have been constituted a public highway according to law."

As you point out, Section 228.070 Laws of Missouri 1953, reads as follows:

"No county court shall order a road established or changed until such proposed road or change has been examined and approved by the county highway engineer."

We see nothing in the township road law which would remove it from the application of the above statute and believe therefore that the above statute does apply. Your second question is whether the word "changed" in Section 228.070, supra, also covers the "vacation" of a road.

In this regard we direct attention to the case of State v. Cox, 282 S. W. 694. At l.c. 695 et seq. the court stated:

"[5] II. Relators contend, in addition, that the ruling of the Court of Appeals to the effect that a compliance with the statutory requirement (section 10789) that the proceedings to vacate the road shall be examined and approved by the county highway engineer was not a requisite condition precedent to the order of vacation by the county court. This contention is based on the absence from section 10789, of the word 'vacating'; its language in regard to this matter being as follows:

" 'No county court shall order a road established or changed until said proposed road or proposed change has been examined and approved by the county highway engineer.'

"The relators cite no cases to support this

Honorable Richard H. Ichord

contention of a conflict. The Supreme Court has by construction, ruled in Aldridge v. Spears, 14 S. W. 118, 101 Mo. 400, in a petition for opening and changing a road, that the terms 'change' and 'changing' are equivalent to 'vacate' and 'vacating.' The section may, therefore, be so applied, and the Court of Appeals' opinion is in harmony therewith."

In the case of Morris v. Karr, 114 S. W. 2d 962, at l.c. 963, the Missouri Supreme Court stated:

"Appellants' chief assignment of error is that the county court had no jurisdiction to enter the judgment vacating the road because it failed to follow a provision contained in section 8013, R.S. Mo. 1929, Mo. St. Ann. § 8013, p. 6831, first inserted in said section in 1909, as follows: 'No county court shall order a road established or changed until said proposed road or proposed change has been examined and approved by the county highway engineer,' and that since the county court had no jurisdiction to make the order and enter judgment thereon, then the circuit court on appeal had no jurisdiction to try the case de novo. The failure of the county court to have the vacation of the road approved by the highway engineer before making the order is conceded by the parties. It is also conceded that such a provision of the statute is applicable to this case in which the vacation of a road is sought. This court has ruled by construction that the terms 'change' and 'changing' are equivalent to 'vacate' and 'vacating.' State ex rel. Tummons et al. v. Cox, 313 Mo. 672, 282 S.W. 694; Aldridge v. Spears, 101 Mo. 400, 14 S.W. 118; and see, also, Sheppard v. May, 83 Mo. App. 272."

From the above we deduce that in vacating a road the county court would have to have the approval of the engineer since the vacating of a road is included in the word "changed" according

Honorable Richard H. Ichord

to the above cited cases.

CONCLUSION

It is the opinion of this department that in a township organization county the county court must have the approval of the county highway engineer in establishing or changing a road.

It is also the opinion of this department that in a township organization county the county court must have the approval of the county highway engineer in vacating a road.

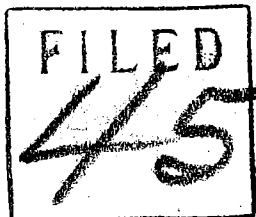
The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours

John M. Dalton
Attorney General

HPW:lc

ELECTIONS: Under Section 113.530, RSMo 1955 Supplement, the
CENSUS: Jackson County Board of Election Commissioners
CITIES: will conduct elections in the city of Raytown,
which according to a census taken by the city
has a population of 11,700.



January 31, 1956

Jackson County
Board of Election Commissioners
Independence, Missouri

Attention: Reginald Smith, Clerk

Gentlemen:

You have recently requested an opinion from this office concerning the power of the Jackson County Board of Election Commissioners to conduct elections in the city of Raytown, under the provisions of Section 113.530 RSMo 1955 Supplement. The facts as submitted by you, and by J. H. Greene, Jr., City Counselor, Raytown, Missouri, will, for the purposes of brevity, be summarized as follows:

Raytown was incorporated in 1950 and has extended its city limits on two occasions since that time. A census was taken by the city pursuant to the provisions of Section 81.030, RSMo 1949, which showed a population of over 11,700. The question asked is whether these facts authorize the Jackson County Board of Election Commissioners to conduct elections in Raytown under Section 113.530, supra.

It will be observed that the census conducted by the city of Raytown is said to have been conducted in conformity with Section 81.030, RSMo 1949, which section provides in part:

"Any such city may at any time, by ordinance and at the expense of the city, cause an enumeration of its inhabitants to be made, and its population ascertained, and such census, when so taken, shall have like force

Jackson County
Board of Election Commissioners

and effect as a state or national census to authorize such city to proceed in securing such other incorporation as its population may entitle it to under the laws and constitution of this state, and for any other purpose that the laws may require, or have any other act or thing to be done making the population a basis thereof; * * *

The statute further provides in paragraph two that after such census is taken and return thereof filed, that "all courts of this state shall take judicial notice of the population of such city or town" and by paragraph four of said section it is made applicable to "cities of the fourth class and towns and villages, and cities and towns under special charters."

From the provisions of this section it therefore appears that the section is applicable to Raytown, which is a fourth class city, and that the census taken under authority of such section has like force and effect as a state or national census for any purpose that the laws may require. This section was first enacted in 1885 and has been in its present form since 1899. It was construed in 1909 by the Kansas City Court of Appeals in the case of State ex rel. Writ v. County Court of Cass County, 137 Mo. App. 698, 119 S.W. 1010 where it was held that a census of a city of the fourth class taken under the provisions of what is now Section 81.030 was effective as affecting the matter of a local optional election. The St. Louis Court of Appeals in the case of State ex rel. Holladay v. Rinke, 140 Mo. App. 645, 121 S.W. 159 concluded that a census taken under the provisions of this section applied to and was effective for all purposes other than ascertainment of population for taxation. In reaching this conclusion the court said at 140 Mo. App. 1.c. 662:

"* * *Section 6300, on the contrary, is general in its object, being taken to ascertain population 'for any other purpose that the law may require or have any other act or thing to be done making the population the basis thereof,' and it expressly enacts that 'this section shall apply to cities of the fourth class, and towns and villages, and cities and towns under special charters.' When a census is to be taken in a city of the fourth class, for any purpose

Jackson County
Board of Election Commissioners

other than ascertainment of population for taxation, it must be taken under section 6300, Revised Statutes 1899." (Sec. 6300 RS 1899 is now Sec. 81.030 RSMo 1949).

Thus it appears that the census taken by the city of Raytown under Section 81.030 is effective for purposes of determining questions relating to elections and that by such census it was determined that Raytown has a population of over 10,000. Therefore, it comes within the provisions of Section 113.530, which makes applicable to such city the provisions of Sections 113.490 to 113.870 RSMo 1955 Supplement. Under Section 113.560 the Jackson County Board of Election Commissioners is given full and complete power to conduct any and all elections in the County, including those in such cities of over 10,000 population.

CONCLUSION

Since Raytown thus has a population of over 10,000 and is located in Jackson County, it is the conclusion of this office on the basis of the foregoing statutes, that the Jackson County Board of Election Commissioners is authorized and required to conduct elections in the city of Raytown, Missouri.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Fred L. Howard.

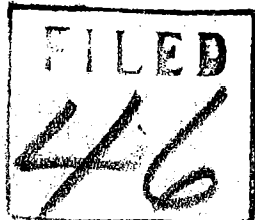
Very truly yours,

John M. Dalton
Attorney General

FLH:vlw

COMPATIBILITY OF OFFICES:
CORONER AND MAGISTRATE:

Magistrate cannot hold both offices of
magistrate and coroner at the same time for
the reasons the duties are incompatible,
each with the other.



February 20, 1956

Honorable John A. Johnson
State Senator, 24th District
Ellington, Missouri

Dear Senator Johnson:

This will acknowledge receipt of your request for an opinion
as to whether a person may hold the offices of magistrate and
coroner.

Under the general rule of common law if the duties are not in-
compatible and there are no statutory or constitutional inhibitions
against it, then it is legal for one to hold both offices at the
same time. The mere fact that one may not have time to hold both
offices in no way affects the right to hold them.

Volume 46, C.J., Section 46, page 941, 942 and 943 lays down
the general and accepted rule in the case as follows:

"At common law the holding of one office does
not of itself disqualify the incumbent from
holding another office at the same time,
provided there is no inconsistency in the
functions of the two offices in question. But
where the functions of two offices are in-
consistent, they are regarded as incompatible.
The inconsistency, which at common law makes
offices incompatible, does not consist in the
physical impossibility to discharge the duties
of both offices, but lies rather in a conflict
of interest, as where one is subordinate to the
other and subject in some degree to the super-
visory power of its incumbent, or where the
incumbent of one of the offices has the power to
remove the incumbent of the other or to audit
the accounts of the other. The question of
incompatibility does not arise when one of the
positions is an office and the other is merely
an employment."

One of the most frequently quoted decisions in this state of

Honorable John A. Johnson

compatibility of office will be found in State ex rel. v. Bus, 135 Mo. 325, 1.c. 338, 33 L.R.A. 616, the pertinent part of which reads:

"* * * At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers; as where one has some supervision of the other, is required to deal with, control, or assist him.

"It was said by Judge Folger in People ex rel. v. Green, 58 N.Y. loc. cit. 304: 'Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law.'"

See also Bruce vs. County of St. Louis, 217 S.W. 2d. 744, and State ex rel. McGoughey vs. Grayston, 163 S.W. 2d. 335, 349 Mo. 700, both of which follow the principle laid down in State ex rel. Bus, supra.

In view of the foregoing it is necessary to examine the statutes and constitutional provision in order to determine if the duties of a magistrate and those of a coroner are compatible.

Section 58.450, RSMo 1949, authorized any magistrate or judge of the circuit court of the proper county to take an inquest if the coroner is unable to do so and to perform all duties enjoined upon said coroner. The 66th General Assembly repealed that statute and enacted a new one known as Section 58.205, RSMo Cum. Supp. 1955:

Honorable John A. Johnson

"The sheriff of the proper county shall, in the temporary absence of the coroner for any reason, perform all the duties imposed by law upon the coroner."

Whether the repeal of Section 58.450 and the enactment of Section 58.205, supra, has any significance as to whether the General Assembly, in repealing and enacting said section did so because it was of the opinion that the duties of the magistrate and coroner were incompatible, or was merely a desire to transfer duties from the magistrate to the sheriff for other reasons, it is difficult to determine. However, it is not unreasonable to contend that it had in mind that such duties might be incompatible.

Section 58.190, RSMo 1949, further authorizes the coroner to execute process and perform all other duties of the sheriff when the sheriff is disqualified.

Section 58.200, RSMo 1949, further requires that when the office of the sheriff shall be vacant the coroner of the county is authorized to perform all the duties which are by law required to be performed by the sheriff until another sheriff shall be appointed and qualified.

It can be seen in view of the foregoing statutes, that if a magistrate holding the office of coroner should be called upon to act as sheriff, that he might be issuing and serving said process and approving his own return thereto and probably performing other conflicting duties. Furthermore, he would be required to take inquests in certain instances.

In view of the foregoing, we are of the opinion there is a possibility that if a magistrate should also be holding the office of coroner at the same time he may be called upon to act as sheriff, the duties of these offices could quite easily be conflicting and incompatible.

We are enclosing copies of two opinions rendered by this department which will support the conclusion reached herein as to the incompatibility of the two offices of magistrate and coroner. One opinion was rendered to you under date of August 19, 1955, and the other to Honorable J. Morgan Donelson, prosecuting attorney of Mercer County, Missouri, under date of December 9, 1955.

Honorable John A. Johnson

CONCLUSION

Therefore, it is the opinion of this department that a magistrate cannot hold both offices of magistrate and coroner at the same time for the reason that the duties are incompatible with each other.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett, Jr.

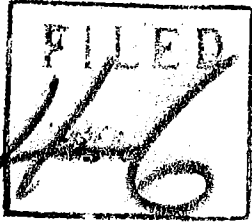
Yours very truly,

John M. Dalton
Attorney General

Enclosures (2)

ARH:mw

LIBRARIES : Provision limiting term of members of board of
CITY LIBRARIES: trustees of city library applicable to incumbents
CONSTITUTIONAL LAW: as well as those elected to board in future for
OFFICERS: first time.



March 6, 1956

Honorable DeVere Joslin
Member, House of Representatives
602 State Street
Rolla, Missouri

Dear Mr. Joslin:

This is in response to your request for opinion dated
February 10, 1956, which reads as follows:

"Under Section 182.190, it is stated that no member of the board shall serve for more than three successive terms and shall not be eligible for further appointment until two years after the expiration of the third term. This is one of the provisions passed during the past session. My question is: does this law retroact or does this three term provision begin when this became a law.

"The Rolla Public Library Board is composed of nine members, five of them new. Of the four older members three would come the three term provision. We need these older members to help direct our board and they would be eligible if you should decide this law does not apply to the terms prior to passage of this section.

"This will come before the city council May first and I would appreciate an answer before that time."

Your question arises out of House Bill No. 261, 68th General Assembly (Sec. 182.190, RSMo, Cum. Supp. 1955), which, with regard to the board of trustees of a city library, reads, in part, as follows:

Honorable DeVere Joslin

" * * * No member of the board shall serve for more than three successive full terms and shall not be eligible for further appointment to the board until two years after the expiration of the third term. * * *"

The Constitution of Missouri, 1945, Article I, Section 13, provides:

"That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted."

It is a well-settled rule of construction that constitutional and statutory provisions are to be construed as having a prospective operation only unless a different intent is evident beyond reasonable question (State ex rel. Scott v. Dirckx, 211 Mo. 568, 577, 111 SW 1). However, a statute is not retrospective merely because a part of the requisites for its action is drawn from a time antecedent to its passing (Endlich on Interpretation of Statutes, Sec. 280, p. 377; State ex rel. Ross to Use of Drainage Dist. No. 8 of Pemiscot County v. General American Life Ins. Co., 336 Mo. 829, 85 SW2d 68, 74).

The standard definition of a retrospective law is as set forth in Dye v. School Dist. No. 32 of Pulaski County, 355 Mo. 231, 195 SW2d 874, 879, where the court said:

" * * * A retrospective law is one that relates back to, and gives to a previous transaction, some different legal effect from that which it had under the law when it occurred. A statute is not retrospective merely because it relates to antecedent transactions, where it does not change their legal effect. * * *"

Quoting from Sedgwick on Statutory and Constitutional Law, the court said in State ex rel. v. General American Life Ins. Co., supra, SW2d 1.c. 73:

"A statute which takes away any vested right acquired under existing laws, or creates a new obligation or imposes a new duty, or

Honorable Devere Joslin

attaches a new disability, in respect to transactions already past is to be deemed retrospective or retroactive."

See also cases cited in Words and Phrases, Retrospective Law or Statute, page 231; 16 C.J.S., Constitutional Law, Section 414, page 856.

If the plain wording of a statutory or constitutional provision concerning eligibility to office because of length of tenure necessitates such a construction, it will be construed as a departure in the law, creating a new rule for the future and inapplicable to the incumbent. For example, the court reached that conclusion in *State ex rel. Scott v. Dirckx*, supra. However, the court, in holding that the constitutional provision limiting the term of sheriffs elected in 1908 did not apply to the incumbent, said at No. 1.c. 579:

"But for the unequivocal language of the amendment itself there would be great force in the argument that the provision limiting the term of a sheriff to four years is one of eligibility, which might refer to the past incumbency of the office as well as the future, but when it is borne in mind that the amendment of 1906 leaves nothing to implication but expressly repeals the former constitutional provision, to-wit, section 10 of article 9, of the Constitution of 1875, it seems to us that it marks a departure in the law and creates a new rule for the future.
* * *

The general rule with regard to statutory and constitutional provisions of this sort is stated in 67 C.J.S., Officers, Section 25, page 154:

"Constitutional provisions limiting the time for which office may be held by one person continuously apply to a person elected before the adoption of the constitution. * * *

Section 182.190, supra, by its wording establishes a disqualification applicable to incumbents, as well as others, who may in the future be elected to the board. The only reason for construing it otherwise would be if it is necessary to do so in order to avoid making it unconstitutional as retrospective in its operation.

Honorable DeVere Joslin

We see no necessity for construing said section otherwise than according to its plain and obvious meaning. It attaches a new disability, but not "in respect to transactions already past." In other words, it is prospective in the sense that it applies only to future elections and does not purport to invalidate prior elections at which a candidate possessing the disqualification might have been elected.

It does not take away "any vested right acquired under existing laws." Although each citizen has a right to serve in public office subject to constitutional and statutory provisions limiting that right, such right is not a vested one, but contingent only. In *State ex rel. McKittrick v. Bair*, 333 Mo. 1, 15, 63 Sw2d 64, 66, the court said:

" * * * The same rule necessarily applies to the other interveners, who as public officers have no contractual right as to their terms of office or their compensation or any vested right in either, the same being subject to legislative control. *State ex rel. Attorney-General v. Davis*, 44 Mo. 129; *Givens v. Daviess County*, 107 Mo. 100, cit. 608, 17 S.W. 998; *State ex inf. Crow, Attorney-General, v. Evans*, 166 Mo. 347, 66 S.W. 355; *Gregory v. Kansas City*, 244 Mo. 523, 149 S.W. 466. * * *"

The Legislature has, in the absence of constitutional inhibition, the same right to provide disqualifications that it has qualifications for office. 67 C.J.S., Officers, Section 11, pages 123 and 125.

Since this statute is one of eligibility, is prospective in the sense that it is applicable only to future elections and is not retroactive within the meaning of Section 13 of Article I of the Constitution of Missouri, 1945, merely because the facts constituting the disqualification may have occurred antecedent to the passage of the act, we are of the opinion that it is applicable to incumbents as well as those who may in the future be elected to the board for the first time.

CONCLUSION

It is the opinion of this office that the provision of Section 182.190, RSMo, Cum. Supp. 1955 (House Bill No. 261, 68th General Assembly), limiting the term of office of members of the

Honorable Devere Joslin

board of trustees of a city library to three successive full terms, is applicable to the incumbents as well as to those who in the future may be elected to the board for the first time.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

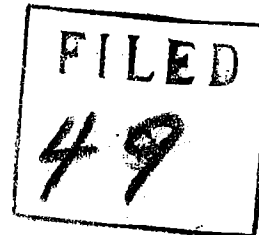
Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml

MAGISTRATE COURTS: The court is authorized to require
COSTS: a reasonable deposit or security
for costs.

January 27, 1956



Honorable J. Marcus Kirtley
County Counselor
Suite 202 Court House
Kansas City, Missouri

Dear Mr. Kirtley:

Your recent request for an opinion from this office was stated as follows:

"It has been called to the attention of the County Court of Jackson County that considerable revenue is being lost through non-payment of Constable's costs in the Magistrate Courts. The suggestion has been made that plaintiff be required, at the time of filing suit, to advance and pay to the Clerk of the Magistrate Court the mileage that will be entailed in the service of the summons.

"I would appreciate your opinion as to whether such procedure is authorized."

Our comments will be directed as much to all costs as to the specific fees for mileage. There is no section of the statutes that specifically authorizes a court to require an advance on court costs or security for them in every case. However, neither do we find one that precludes the court from making such a requirement.

You will note that Section 514.010, RSMo 1949, lists the specific instances in which security for costs or deposits might be required before commencing suit. This requirement is discretionary with the judge. See *Carrier v. Missouri Pacific Railroad*, 175 Mo. 470, 74 S. W. 1002. It does not preclude a reasonable security for costs or a deposit in other cases.

Honorable J. Marcus Kirtley

In ordinary actions each party litigant is primarily responsible for the costs he incurs. See *Chilton v. Drainage District No. 8 Pemiscot County*, 228 Mo. App. 4, 63 S.W. (2d) 421.

The intimation is left in some cases that the plaintiff may be required to advance the costs. See *Crook v. Tull*, 111 Mo. 283, 20 S.W. 8.

In view of the fact that we are convinced that the judges have the inherent power to manage and run their own affairs within their respective courts, we believe that they may require a reasonable deposit or a reasonable security for court costs.

The magistrate courts, in this respect, have the same authority as do the circuit courts. It is common knowledge that many circuit courts do make such requirement. As far as can be learned, the circuit courts that make the requirement rely only upon Section 514.020 and their inherent power to control the affairs of their court. It is contended by some that if 514.020 permits the court to require the deposit, upon motion, after suit is commenced, little objection can be found against dispensing with the technical requirement of the motion, and with demanding a deposit before suit is commenced.

CONCLUSION

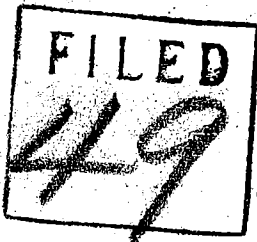
It is, therefore, the opinion of this office that Section 514.020, RSMo 1949, and the inherent power of the court, are sufficient to authorize a magistrate court to require a reasonable deposit or security for court costs prior to the commencement of a suit.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Russell S. Noblet.

Very truly yours

John M. Dalton
Attorney General

COUNTIES: TAXATION:
STATE TAX COMMISSION:
INCREASE OF ASSESSMENT:
ASSESSMENTS:



Increase of ten per cent or more in assessed valuation of a county made pursuant to order of the State Tax Commission before the county court finally sets the tax rate does not bring into operation the provisions of Section 137.073, RSMo Cumulative Supplement 1955.

March 8, 1956

Honorable J. Marcus Kirtley
County Counselor
Jackson County Courthouse
Kansas City, Missouri

Dear Sir:

This will acknowledge receipt of your recent letter requesting an opinion from this office, which request reads as follows:

"Jackson County, Missouri is in receipt of a letter from the State Tax Commission of Missouri advising that a ten percent increase in the assessment of all real estate in this County is required for the calendar year 1956.

"In considering the consequences of such action, attention is necessarily directed to the provisions of Section 137.073 enacted in 1955 by the 68th General Assembly. With respect to the interpretation and effect of that section, I respectfully submit to you for your opinion the following questions:

"1. Assuming that the increase of ten percent or more in assessed valuation is made by the county assessor or after action by the County Board of Equalization prior to August 10, 1956 (the date when the final tax levy must be made in Jackson County pursuant to the provisions of Section 137.390, R.S. Mo. 1949), do the provisions of such section for a mandatory reduction in the tax rate apply?

Honorable J. Marcus Kirtley

"2. Section 137.073 requiring immediate revision of the tax levy apparently conflicts with Section 137.390 which requires the final levy to be made on or before August 10th of each year. Does Section 137.073 repeal inferentially Section 137.390?

"3. Section 137.073 apparently conflicts with Section 138.340, R. S. Mo. 1949, which vests in the County Court the sole authority to set the tax rates within the constitutional limitation. Does the 1955 Act repeal the former Act? * * *

The facts in your request presuppose that the increase of ten per cent or more in the assessed valuation of Jackson County will be made before the tax levy is finally fixed by the county court. Section 137.390 RSMo 1949 provides that such final determination of the tax levy shall be made not later than August 10th of each year. This statute reads:

"After the assessor's book shall be corrected and adjusted according to law, but not later than August tenth of each year, the county court shall ascertain the sum necessary to be raised for county purposes, and fix the rate of taxes on the several subjects of taxation so as to raise the required sum, and the same shall be entered in proper columns in the tax book."

You state that the State Tax Commission has advised that it will be necessary for Jackson County to increase the assessment of real estate in the calendar year 1956. Under the statutory procedure if such increase is not made by the local officials the State Tax Commission, under Section 138.390, RSMo 1949, is authorized and required to equalize the valuation of each class of property among the respective counties, and under Section 138.400 RSMo 1949, notice of such equalization must be given before the second Monday in July of each year. Thus, under this procedure notice of such equalization must be given before the last date upon which the county court shall finally fix the rate of levy.

Honorable J. Marcus Kirtley

Section 137.073 RSMo Cumulative Supplement 1955, operates only where the assessed valuation has been increased by ten per cent or more and such increase is made after the rate of levy has been determined and levied by the county court. Thus, where the increase occurs before the levy is made by the county court the provisions of Section 137.073 are not operative and no problem is raised. This for the simple reason that under Section 137.390, RSMo 1949, the county court fixes the rate of tax so as to raise the required sum of money, and when such rate is fixed upon the increased valuation it is the contemplation of the law that the rate will be fixed as directed, based upon the increased valuation so as to raise the required sum.

In answer to the second question propounded in your request it would seem obvious from the above discussion that Section 137.390, RSMo 1949, is not in any manner repealed by Section 137.073 RSMo Cumulative Supplement 1955, since the latter section is operative only when an increase in assessment occurs after the tax levy has been made and then allows the county court to adjust such levy on the basis of the new assessed valuation so as again to produce only the required sum as is expressly provided in Section 137.390, RSMo 1949.

As to the third question which you ask, Section 138.340, RSMo 1949, provides as follows:

"1. The commission shall have no power to fix the rate of levy for the state or any political or municipal subdivision thereof, nor shall the commission have any power or authority to supervise the fixing of any tax levied or to be levied.

"2. County courts, city councils, school boards, and all other bodies legally authorized to make levies, shall be and remain free to make the rate of levy for their respective local political subdivisions or municipalities at any figure not prohibited by the constitution or laws of the state."

It will be noted that this section deals with the fixing of the rate of levy, not with the amount of assessment. Thus, the action of the State Tax Commission in requiring an increase

Honorable J. Marcus Kirtley

of assessment cannot in any way conflict with the provisions of Section 138.340, RSMo 1949. It should also be noted that the authority of the county court in fixing the rate of levy is limited to "any figure not prohibited by the constitution or laws of the state." Section 137.073 RSMo Cumulative Supplement 1955 does not in any manner attempt to limit the discretion and judgment of the county court in fixing the rate of levy; it operates only when the assessment has been increased by ten per cent or more after the rate of levy has been finally determined and it operates to require the county court to determine (on the basis of the increased assessment) the rate of levy necessary to produce from all taxable property substantially the same amount of taxes as previously estimated to be produced by the original levy. There is, therefore, no conflict between the provisions of these two sections, and obviously there is no repeal of one by the other.

CONCLUSION

It is, therefore, on the basis of the foregoing, the conclusion of this office that the provisions of Section 137.073 RSMo Cumulative Supplement 1955, are operative only when the assessed valuation of the county is increased after the county court has made its final determination of the tax levy and would have no effect whatever in the situation which you mention. The provisions of Section 137.073 RSMo Cumulative Supplement 1955, are not in conflict and do not in any way repeal the provisions of Section 137.390 RSMo 1949 and Section 138.340 RSMo 1949.

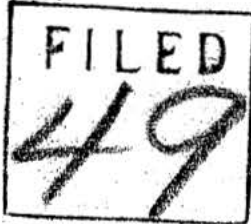
The foregoing opinion, which I hereby approve, was prepared by my assistant, Fred L. Howard.

Yours very truly,

John M. Dalton
Attorney General

FLH:vlw

COURT REPORTERS: Construction of Section 485.100, MoRS Cum. Supp. 1955.
FEES: Time when official court reporter may submit bill for making up a transcript requested by the court on an appeal by a poor person. When state or county is liable for such costs. Procedure for reimbursement to county by state when liability is that of state.



June 11, 1956

Honorable J. Marcus Kirtley
County Counselor, Jackson County
202 Courthouse
Kansas City, Missouri

Attention: Mr. Richard H. Koenigsdorf,
Assistant County Counselor.

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads:

"At the instruction of J. Marcus Kirtley, County Counselor of Jackson County, I am writing you requesting an opinion as to the effect upon the County of the amendment made by the Legislature in 1955 to Section 485.100 of the Revised Statutes pertaining to payment of court reporters' fees for transcript upon pauper appeal in criminal cases. The change in the statute appears to shift the responsibility for payment of such fees from the State to the County so that the reporters need not have the long delay as heretofore in getting their fees paid.

"This slight change in the statute leaves a number of questions unanswered and apparently presents a budget item to the county which was not considered. We have just received one bill from a court reporter requesting immediate payment of the cost for the transcript of one William D. Mace who was sentenced to the State Penitentiary and is presently incarcerated there pending the outcome of his appeal which was filed as a poor person.

Honorable J. Marcus Kirtley

"It would be appreciated if consideration would be given to the following questions and an opinion provided:

"1. At what point in the proceedings is the Court Reporter entitled to submit a bill to the county?

"2. When is the County required to approve a voucher and make payment?

"3. From what funds should such vouchers ordinarily be paid - General Funds, Circuit Court Funds, or other funds?

"4. How is determination made as to whether reporters' fees are taxed against county or state in light of this statute?

"5. If the county pays the fees and then they are taxed against the state, what is the procedure for the county to be reimbursed?"

We are inclined to be of the opinion that the main purpose for the Legislature enacting Section 485.100, MoRS Cum. Supp. 1955, was to provide a method to expedite payment of fees to the court reporter for making up a transcript on appeal. It is well known that reporters in the past in certain instances were required to wait an unusually long time for their fees for preparing such transcripts and occasionally this would run into considerable sums. Having this in mind we shall now examine the pertinent statutes.

You request a construction of Section 485.100, MoRS Cum. Supp. 1955, which reads:

"For all transcripts of testimony given or proceedings had in any circuit court, court of common pleas or court of criminal correction, the court reporter shall receive the sum of forty-five cents per twenty-five line page for the original of said transcript, and the sum of fifteen cents per twenty-five line page for each carbon copy thereof; the page to be approximately eight and one-half inches by eleven inches in size, with left-hand margin of approximately one and one-half inches and the right-hand margin of approximately one-half inch; answer to follow question on same line when feasible; such page to be designated as a legal page. Any judge, in his discretion, may

Honorable J. Marcus Kirtley

order a transcript of all or any part of the evidence or oral proceedings, and the court reporter's fees for making the same shall be paid by the county, upon a voucher approved by the court and taxed against the state or county as may be proper. In criminal cases where an appeal is taken by the defendant, and it appears to the satisfaction of the court that the defendant is unable to pay the costs of the transcript for the purpose of perfecting the appeal, the court shall order the same to be furnished, and the court reporter's fees for making the same shall be paid by the county, upon a voucher approved by the court, and taxed against the state or county as may be proper; and in such case the court reporter shall furnish two transcripts in duplication of the notes of the evidence, for the original of which he shall receive forty-five cents per legal page and for the copy fifteen cents per page."

Prior to said section becoming effective, Section 485.100, Laws Mo. 1951, page 449, was the prevailing law and it specifically required that such costs shall be taxed against the state or county as may be proper and reads, in part:

"* * *Any judge may, in his discretion, order a transcript of all or any part of the evidence or oral proceedings for his own use, and the court reporter's fees for making the same shall be taxed in the same manner as other costs in the case; Provided that in criminal cases where an appeal is taken or a writ of error obtained by the defendant, and it shall appear to the satisfaction of the court that the defendant is unable to pay the costs of such transcript for the purpose of perfecting the appeal, the court shall order the same to be furnished and the court reporter's fees for making the same shall be taxed against the state or county as may be proper; and in such case the court reporter shall furnish two transcripts in duplication of the notes of the evidence, for one of which he shall receive the sum of 45 cents per legal page for the original, but shall receive no compensation for the other."

Honorable J. Marcus Kirtley

A casual reading of the foregoing statute discloses that the repealed statute merely provided that the court reporter's fees for making said transcript shall be taxed against the state or county as may be proper, while the present law, Section 485.100, MoRS Cum. Supp. 1955, requires that the court reporter's fees for making said transcript shall be paid by the county upon a voucher approved by the court and taxed against the state or county as may be proper.

You first inquire at what point in the proceedings is the court reporter entitled to submit a bill to the county?

It will be seen that under Section 485.100 MoRS Cum. Supp. 1955, it does not indicate that such costs shall forthwith be paid by the county upon a voucher neither does it indicate when this shall be done. However, in view of what we consider the legislative intent as hereinabove expressed, which was to expedite payment of such fees, certainly they should not be withheld until a fee bill for all costs in the case is prepared by the clerk of the court after adjournment of court, as provided in Section 550.140 MoRS 1949.

We believe a reasonable and sensible construction should be placed on such statute and that should be that as soon as a transcript is prepared, and certified to by the court and prosecuting attorney, the court should then approve a voucher for said cost without any delay. This more or less conforms to Section 550.220, MoRS 1949. Subsequent thereto it can be determined whether the county or state shall be charged with such costs and if it should be an obligation of the state then the state may reimburse the county therefor.

We believe your second inquiry has been answered hereinabove along with your first one.

In your third inquiry you ask from what fund said voucher shall be paid?

Section 50.550, MoRS 1949, provides for an annual budget for counties of the first class which shall contain adequate provisions for various expenditures among which is the cost of holding circuit court in such county. Therefore, we are of the opinion that such expenditure should be paid out of the fund hereinabove provided for the holding of circuit court in such county.

In inquiry numbered 4 you ask as to how it may be determined whether said reporter's fee for the transcript prepared shall be taxed against the county or state?

Honorable J. Marcus Kirtley

Apparently such fee is still considered as a court cost as shown under Section 485.100, Laws Mo. 1951, page 449, and as indicated in the same section of Cum. Supp. 1955. To determine whether the county or state shall be taxed for such fee we refer you back to Chapter 550, MoRS 1949, which clearly specifies just who shall pay the costs, and especially refer you to Sections 550.020, 550.030 and 550.040, particularly dealing with whether the county or state shall pay costs in the case. These statutes are followed by others indicating that under certain conditions and circumstances the prosecuting attorney or complainant shall be liable for costs.

We do not consider it necessary to deal with the question further as a careful reading of said chapter will enable you to determine under the particular facts and circumstances whether the county or state is liable for such costs.

Your fifth and last inquiry is, if the county pays the fees and subsequently it is determined that such fees are an obligation of the state, just what is the procedure for reimbursing the county?

In such instances we are of the opinion that the county clerk would present to the circuit clerk an itemized certification of fees paid and the circuit clerk would include such itemization in his cost bill submitted to the state comptroller.

CONCLUSION

Therefore, it is the opinion of this department that:

(1). When a person convicted of a felony appeals as a poor person and the official court reporter is requested by the court to make a transcript, said reporter may submit a bill to the county for his fee for such service rendered at any time after said transcript has been prepared and certified to by the court and prosecuting attorney and the voucher is approved by the court.

(2) As stated hereinabove, the voucher for such fee must be approved by the court and paid after the fee is duly certified to by the circuit court and prosecuting attorney.

(3) Such fee should be paid from the fund for payment of expenses of the circuit court as provided in Section 50.550, MoRS 1949.

(4) Said fee shall be taxed against the county or state under the facts and circumstances in each individual case and as provided in Chapter 550, MoRS 1949.

Honorable J. Marcus Kirtley

(5). If the county pays such fee and it is later determined that it is an obligation of the state the county clerk would present to the circuit clerk an itemized certification of fees paid and the circuit clerk would include such itemization in his cost bill submitted to the state comptroller.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

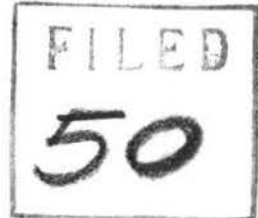
John M. Dalton
Attorney General

ARH:mw

MOTOR VEHICLES:
ABANDONMENT:

In order to constitute abandonment of property, the owner must voluntarily abandon with no intention of retaking.

January 27, 1956



Honorable Paul Knudsen
Prosecuting Attorney
Caldwell County
Hamilton, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"At the present time, the Sheriff of Caldwell County, Missouri, has in his custody three automobiles. One of the automobiles was left here by a man who was picked up by the Highway Patrol and held for Kansas authorities. This man was extradited and we have not heard from him since. The car has been in Caldwell County approximately three months now.

"The second car is a car that was abandoned in Braymer, Missouri, and from the information that we can receive, the owner, who was a section hand on the railroad, has left the state and cannot now be found.

"The third automobile is a 1951 Lincoln automobile that was used in the commission of three burglaries in Polo, Missouri, and the subjects performing the burglaries were surprised in the act. One was apprehended but the owner of the automobile escaped, and, although we have warrants issued for him, he has not been apprehended to date. There has been no claim laid on this car by anyone; however, the license plate and the bill of sale, which was in the glove compartment of the car, were issued to a Robert Mathis who has an extensive police record, and evidently has left the state in an effort to avoid prosecution on this matter.

"All three of these cars have been in our custody over a period of more than three months' time. What, if any, is the proper procedure to get rid of said automobiles and is it possible for us to advertise and sell same turning the money into the county? If such is possible, what is the proper procedure for us to take to obtain title to same so that we may get rid of these automobiles and get them off our hands?"

Honorable Paul Knudsen

We believe that the only approach to this matter, whereby the county could obtain legal right to the motor vehicles mentioned by you above, is upon the theory of abandonment.

The most recent (1952) statement as to what constitutes an abandonment is found in the case of *Linscomb v. Goodyear Tire and Rubber Co.*, 199 Fed. (2d) 431. In its opinion in that case the court stated (1.c. 435):

"We have recently had occasion to consider the Missouri law on the issue of abandonment. *Equitable Life A. S. v. Mercantile-Commerce Bank & Trust Co.*, 8 Cir., 155 F.2d 776; *Rosenbloom v. New York Life Ins. Co.*, 8 Cir., 163 F. 2d 1; *Motlow v. Southern Holding & Securities Corp.*, 8 Cir., 95 F. 2d 721. In *Equitable Life A. S. v. Mercantile Commerce Bank and Trust Co.*, supra [155 F. 2d 780], we said that the definition of Missouri courts was to the effect that abandonment 'is a fact made up of an intention to abandon, and the external act by which the intention is carried into effect.' In *Rosenbloom v. New York Life Ins. Co.*, supra [163 F. 2d 8], also determined under the laws of Missouri, we among other things said, 'For this court, Judge Johnsen has recently stated the Missouri rule in *Equitable Life Assur. Soc. of United States v. Mercantile-Commerce Bank & Trust Co.*, 155 F. 2nd [776] 777, 779-780."

At 1. c. 436, the court further stated:

"A review of the Missouri decisions convinces that an abandonment involves a conscious purpose on the part of the owner of personal property to so treat it as to manifest an intention thereafter neither to use nor to retake it into his possession, and there can be no abandonment absent a composite fact, one element visible, the other sounding in intention, motive."

Similar statements of the law are to be found in the Missouri case of *Gale v. Nolan*, 137 SW2d 974, a 1940 case, and *Gerber v. Appel*, 164 SW2d 225, a 1942 case. All of this appears to come down to the fact that in order to have an abandonment the owner of a thing must intend to abandon it, must do so in fact, and must do so in a manner which indicates an intention not to retake or use it in the future.

Now, in the light of the above definition of "abandonment" let us apply the definition to the facts in the three situations set forth by you, in order to determine whether an abandonment has in fact occurred.

In the first situation you state that a man was in Hamilton, Missouri, in possession of a motor vehicle; that he was taken into

Honorable Paul Knudsen

custody by the highway patrol, and was subsequently extradited to the state of Kansas about three months ago, his motor vehicle remaining in Hamilton. It would seem clear that in this situation there has not been an abandonment within the terms of the above definition. This man, rightly or wrongly, was by force removed from possession of his motor vehicle and from the state of Missouri. There is no indication of an intention on his part to abandon the motor vehicle; no indication that he does not intend to retake it in the future, if he is at any future time physically able to do so. You do not know that the charge upon which he was extradited to Kansas will not be dismissed; or that if tried he will not be acquitted, and will then return to claim his motor vehicle; or that if tried and convicted, he will not, at the completion of his sentence, return to claim his motor vehicle. And at this point we will observe that we are unable to see that the fact that a person is suspected of or has participated in a crime has any bearing upon the matter of abandonment of property, except as is pointed out above.

Our conclusion, therefore, in the first instance, is that there has not been an abandonment and that nothing can be done toward disposing of this motor vehicle until there is substantial evidence of abandonment within the terms of the definition given above.

In the second situation, an itinerant worker left his motor vehicle in Braymer, Missouri, and is thought to have left the state, having been gone over three months. In the absence of any further facts we do not believe that this constitutes an abandonment. It is entirely possible that the owner intended to return for his property, but has been detained by accident, illness, or any one of numerous other reasons. There is no indication that he had no intention of returning for his property. Of course, other facts, not stated by you, could well enter into a construction of his intent. If the motor vehicle was old, of little value, in bad repair or wrecked, left in a public or semi-public place, the conclusion of abandonment would be stronger than if it was of substantial value and had been left in a private or semi-private place. But upon the basis of the facts given us, we do not believe that an abandonment has occurred.

In the third situation, the owner of the motor vehicle was surprised in the commission of a crime and fled, leaving his motor vehicle behind. We do not believe this constitutes an abandonment. Undoubtedly the owner left his motor vehicle behind, not because he had any intent to do so, but because he had to do so in order to avoid capture. Neither is there anything to indicate that if and when he gets clear with the law that he does not intend to return for his property. It would seem, in the light of the definition above, that abandonment must be voluntary and with no thought of repossession. These elements do not appear here.

We note that Section 7, C.J.S., Vol. 1, p. 15, states that:

"An intention to abandon property, or a right, will not be presumed, at least where the conduct of the owner or holder can be explained consistently with an intention to hold or continue to claim the thing. It has even been said that the presumption is that one having property or a right did not intend to abandon it, but this is probably to be given no more weight than as a statement in different language of the general principle that abandonment will not be presumed; and, on the contrary, it has been held that, if the thing asserted to have been abandoned is shown to have been deemed by its owner, and by the general opinion of the community, valueless and merely a hindrance, the presumption that the owner intended to preserve it, or that he did not intend to abandon it, cannot arise, and that conduct on his part, inconsistent with an intention to continue to claim the property or right, may raise a presumption of abandonment, but these would seem to be inferences drawn from the facts, rather than presumptions, properly so called (Evidence § 115 [22 C.J. p. 83 notes 60-62]).

"So, the burden of proving an abandonment rests on one who asserts or relies on it, and it is incumbent on him to make it affirmatively appear that the property or right has been relinquished by its owner or holder, with the intention of abandoning it, and with no intention of returning to or reclaiming it."

We also call attention to Sections 8 and 9 et seq., which read, respectively:

"Sec. 8. The question of abandonment vel non, that is, whether there has been actual relinquishment of property or a right, and an intention to abandon it, is ordinarily a question of fact, to be determined by the jury under all the circumstances of the case, and not a question of law, although it has, somewhat loosely, been said to be a question of mixed law and fact.

"Where, however, there is, and can be, no dispute about the facts, that is to say, where all the essential facts are admitted or indisputably proved, and the inferences to be drawn from them are certain and free from doubt, and establish the fact of abandonment with reasonable certainty, the question may be

withdrawn from the jury, and abandonment be declared by the court as a matter of law; or, on the other hand, where the evidence is, as a matter of law, insufficient to show abandonment, it seems that the court may likewise determine the question without submitting it to the consideration of the jury."

"Sec. 9. An abandonment of property or a right divests the title and ownership of the owner, as fully and completely as would a conveyance, from the time of the act of abandonment, and so, while the term 'loss' has a different connotation from 'abandonment', and is properly to be distinguished therefrom, an abandonment may be said to amount to the loss, in the more general sense of that word, of the abandoning owner's interest in, or title to, the property or right abandoned, so as to bar him from further claim to it, except as he, like anyone else, may thereafter appropriate it and make it his own if it has not already been appropriated by another. One who has abandoned property does not regain legal possession or ownership of it by mere vague utterances as to its probable future value and indefinite suggestions as to what he may do with it in time to come.

"Personalty, on being abandoned, ceases to be the property of any person, and thenceforth is noman's property, unless and until it is reduced to possession with intent to acquire title to, or ownership of, it. It may, accordingly, be appropriated by anyone, if it has not been reclaimed by the former owner, and ownership of it vests, by operation of law, in the person first lawfully appropriating it and reducing it to possession with intention to become its owner, provided, it has been said, the taking is fair. One so appropriating abandoned property, or any third person whom he may allow to take it, has a right to the property superior even to that of the former owner, and may hold it against him. In certain instances it has been held, probably as an application of these rules as to abandonment and appropriation, although this is not entirely clear, that personalty abandoned on the land of another became the property of the owner of such land."

Therefore, we do not believe that in any of the situations set forth by you there has been an abandonment within the definition, nor that until there has been, anything can be done toward disposing of these motor vehicles. If we are correct in our conclusions above, then it may be asked what facts and circumstances in each of the three cases cited by you would be necessary, in addition to the present facts, to constitute an abandonment.

Honorable Paul Knudsen

It would appear that continued absence of the owner would strengthen the theory of abandonment, and that the longer the absence the stronger the theory would become.

Incarceration of an owner for a long period of time and no effort on his part to reclaim his motor vehicle, would be evidence, as would the fact of the death of the owner without administration being had on his estate. Generally, on this point, subsection (b) of Section 7, C.J.S., Vol. 1, p. 15, states:

"The courts have held that, on a question of abandonment, as on one of fraud, a wide range should be allowed as to the evidence, both that tending to prove abandonment and that tending to rebut the allegation. Like any other fact, abandonment may be shown by circumstances, or it may be proved by the acts, conduct, or declarations of the abandoning owner."

From the above it appears that when property is truly abandoned that ownership of it vests in the first person appropriating it thereafter.

Since we have held that there has been no abandonment in this case, it is unnecessary for us to pass upon the other questions asked by you, since they are based upon the theory that abandonment has taken place.

CONCLUSION

It is the opinion of this department that in order to constitute abandonment of property the owner must voluntarily abandon, with no intention of retaking.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW/ld

*Engineer :
County Engineer :*

COUNTY COURTS:
SUNDAY AND HOLIDAY WORK:

A county court would be justified in paying a county engineer for county work done by the engineer on holidays and Sundays.



February 17, 1956

Honorable Paul Knudsen
Prosecuting Attorney
Caldwell County
Kingston, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"The County Court of Caldwell County has asked me to request an opinion from you in reference to the County Highway Engineer.

"Section 61.190, paragraph 2, Revised Statutes of Missouri, as amended by laws of 1953, page 385, states: 'In all counties of third and fourth class the County Highway Engineer shall receive as compensation an amount fixed by the County Court, for each day he shall actually serve as County Highway Engineer. The amount so fixed shall not exceed \$10.00 per day in counties of class three nor \$8.00 per day in counties of class four.'

"The question that the County Court has requested that I present is: Under this law, can the County Highway Engineer, providing he works on a Sunday or a holiday, bill the County Court for that Sunday or a holiday, and is the County Court justified in paying for that day?"

We believe that under the above law the county court would be justified in paying the county highway engineer for each day that he worked for the county, even though such day was a legal

Honorable Paul Knudsen

holiday or was Sunday.

So far as legal holidays are concerned, there has never been any question, so far as we know, about the right of a person to work, and to be paid for working, on a legal holiday. The same is not true about Sunday, regarding which there has long been considerable ambiguity. In this regard we direct attention to Section 563.690, RSMo 1949, which reads:

"Every person who shall either labor himself, or compel or permit his apprentice or servant, or any other person under his charge or control, to labor or perform any work other than the household offices of daily necessity, or other works of necessity or charity, or who shall be guilty of hunting game or shooting on the first day of the week, commonly called Sunday, shall be deemed guilty of a misdemeanor, and fined not exceeding fifty dollars."

In 1953, the Missouri Supreme Court, in the case of McKaig v. Kansas City, 256 S.W.2d 815, sustained the legality of the above section, holding that (l.c. 816) "the laws of this state that prohibit work on Sunday 'are civil, not religious, regulations, and are based upon a sound public policy which recognizes that one day of rest in seven is for the general good of mankind.* * *'"

Of course, if work done on Sunday is a work "of necessity," it is, by the terms of the statute, excluded from the operation of the statute. What is and what is not a work "of necessity" is not always by any means clear. In the case of State v. Stuckey, 90 Mo. App. 664, at l.c. 666, the court stated:

"What labor should be called a work of necessity or charity has produced as much of conflict of decision as any other branch of the law, and Ringgold's Law of Sunday, 193, says: 'It is safe to say that the vagueness of these words, and the impossibility of applying them with anything like uniformity to everyday life, would cause the courts to hold the whole law void for uncertainty, if it were anything else but a Sunday law.'* * *"

If your county court believed that the work done by the county engineer on Sunday was a work "of necessity," they would certainly be justified in ordering such work to be done and in paying for it.

Honorable Paul Knudsen

Furthermore, we do not know who would be in a better position to judge when such county work was "of necessity" than would be the judges of the county court. Neither do we think that it would be at all likely that anyone would challenge the judgment of the court on this matter.

CONCLUSION

It is the opinion of this department that a county court would be justified in paying a county engineer for county work done by the engineer on holidays and Sundays.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW/ld

TOWNSHIPS:
OFFICERS:
PUBLIC OFFICERS:
SALARY:
COMPENSATION OF OFFICERS:

Township trustee and members of the township board elected before the effective date of Section 65.230 RS Mo 1955 Cum.Supp., may not receive the increased compensation authorized therein during their present term of office. Officers whose terms began after said Act took effect may receive the increased compensation.



May 24, 1956

Honorable Robert Lamar
Prosecuting Attorney
Texas County
Cabool, Missouri

Dear Sir:

You recently requested an official opinion of this office concerning the following matter:

"Texas County is a county of the third class, and is one of the remaining counties in this State under township organization. I have been asked several times by township officers for an interpretation of Section 65.230 V.A.M.S. as amended by H.B. 353, Laws of 1955.

"This amendment took effect August 29, 1955. The township clerks were elected in September, 1955, a few days after the passage of this Act. The township trustees and other members of the township board were elected in the preceding April, and were already serving at the time this amending act took effect. The amended act did not assign any additional duties to the township officers.

"Query:

"Does the township clerk who was elected for a term beginning after the amending act took effect draw the increased pay; do the trustees and other members of the township board who were serving as such when the amending act took effect draw the increased pay, or is that amending act effective as to them during the term they were serving when the act took effect. "

Honorable Robert Lamar

As to the township clerk whose term began in September, 1955, there is no problem since Section 65.230 RSMo 1955 Cum.Supp. became effective August 29, 1955. The increased compensation provided therein was in effect at the time of the commencing of the clerk's term of office, and there can be no question of increase of compensation during his term so as to conflict with the provisions of Article VII, Section 13 of the Missouri Constitution of 1945. That section reads as follows:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

As to the township trustee and members of the township board, who were in office at the time said section became effective, the problem is more difficult. The Constitution specifically prohibits an increase in the compensation of "state, county and municipal officers." Thus, if these township officers come within that classification, they may not receive the additional compensation during their present term of office. On the other hand, if they do not constitute such state, county or municipal officers, they may receive such increased compensation. See *State ex rel. Webb v. Pigg*, (Sup.) 249 SW2d 435. While this case was concerned primarily with whether or not the officer there in question (the clerk of the Springfield Court of Appeals) was a state officer within the above provision of the constitution, the discussion contained in that opinion throws considerable light upon the present problem. It was there held that where an officer has been delegated some substantial part of the sovereign power of the state, to be independently exercised with some continuity and without control of a superior power other than the law, he comes within the constitutional definition and is a state or public officer. The Court went on to say, l.c. 441:

"In recent opinions of this court special emphasis has been placed upon whether the particular individual in question performs his duties independently and without control of a superior power other than the law, that is, whether he is endowed by law with the power and authority to use his own judgment and discretion in discharging the sovereign functions of government which have been vested in him by statute and which functions are to be exercised by him for the benefit of the public. A careful review of all the statutory

Honorable Robert Lamar

and constitutional provisions relied upon in connection with the application of the established test to determine whether relator is a 'state officer' or a 'public officer' within the meaning of Section 13, Article VII, Constitution of Missouri 1945, convinces us that relator is not such an officer."

When the provisions of Chapter 65 RSMo 1949 are examined, it appears that the township trustee is a member of the township board and that as such it is the duty of the trustee and the other members of the board to audit the accounts of the other officers of the township (except the assessor), and likewise to audit demands against the township. Further, their duty is to levy taxes for township road and bridge purposes and to perform all other duties provided by statute. The trustee receives and pays out the money of the township on order of the township board, keeps the accounts, and generally conducts the financial business of the township.

From these statutes, it appears that the trustee, together with the other members of the township board, is, in effect, the executive head of the township, levying and collecting taxes and receiving and expending the moneys of the township.

In the case of State ex rel. Kinder v. Little River Drainage District, 291 Mo. 267, 236 SW 848, the Supreme Court held that, under the provisions of the Missouri Constitution of 1875 exempting from taxation the property of "counties and other municipal corporations," an organized township was a municipal corporation and this being so, it would appear that the trustee and other members of the township board would be municipal officers.

CONCLUSION.

It is therefore, on the basis of the foregoing, the conclusion of this office that the township trustee and the other members of the township board come within the prohibition contained in Article VII, Section 13 of the Missouri Constitution, and that their compensation may not be increased during their respective terms of office and, since they were in office on August 29, 1955, the effective date of Section 65.230 RSMo 1955 Cum.Supp., they may not receive during their present term of office the increased compensation therein provided. As to the township clerk, whose term of office began after the effective date of said section, he may receive the increased compensation therein provided.

Honorable Robert Lamar

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Fred L. Howard.

Very truly yours,

John M. Dalton
Attorney General

FLH:sm

- CRIMINAL COSTS: 1. Fees of witnesses for a defendant who has taken an appeal as a poor person are not paid by the state or county.
2. Fees of rebuttal witnesses used by the state, whose names have not been endorsed upon the information, are taxable against the state where the prosecuting attorney in writing orders subpoenas to be issued to them and when the prosecuting attorney shall file an affidavit that witnesses ordered by him are necessary to a complete adjudication of the case.



June 13, 1956

Honorable Alden S. Lance
Prosecuting Attorney
Andrew County
Savannah, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"I should like very much to have an opinion from your office concerning the question of witness fees to be taxed as costs against the State of Missouri in a criminal case. The facts are as follows: A man has been charged with the felony of burglary and larceny and has been tried by a jury and found guilty and sentenced to ten years in the State Penitentiary. The defendant then files an Affidavit, alleging that he is without funds to pay his costs and expenses of Appealing his case to the Supreme Court and the Circuit Judge allows the defendant to prosecute his Appeal as a poor person. The Supreme Court then upholds the judgment and conviction of the Circuit Court.

"My question is this. Does the fact that the defendant has taken his Appeal as a poor person mean that the Circuit Clerk must certify the fees of defendant's witnesses as part of the costs to be paid by the State? It is my belief that only the fees of the witnesses who have been endorsed by the State may be taxed as costs against the State in a case where the defendant has been convicted and sentenced to the Penitentiary. In my fact situation defendant's witnesses are, of course, persons whose names were not endorsed upon the Information.

Honorable Alden S. Lance

"Would the fees of rebuttal witnesses used by the State, whose names had not been endorsed upon the Information, be taxable as costs against the State where the facts are as indicated above? "

In regard to your first question, whether or not the fact that a defendant has taken an appeal as a poor person means that the circuit clerk must certify the fees of defendant's witnesses as a part of the costs to be paid by the State is, we believe, answered in the negative by an opinion rendered by this department on June 2, 1943, to William E. Shirley, Prosecuting Attorney of Adair County. A copy of this opinion is enclosed.

Your second question is whether the fees of rebuttal witnesses used by the State, the names of whom have not been endorsed upon the information, would be taxable as costs against the State. Sections 550.150 and 545.320, RSMo 1949, read:

"The clerk shall attach to each fee bill a certified copy of the names of all witnesses endorsed on the indictment or information and all orders of the prosecuting attorney and affidavits of the prosecutor as provided for in Section 545.320, RSMo 1949 and no costs shall be paid any state witness not therein.

"No subpoena for a witness in any criminal case shall be issued on the part of the state, unless the name of such witness be endorsed on the indictment or information, or the prosecuting attorney shall order the same to be issued, in writing, or the prosecutor shall file an affidavit that other witnesses ordered by him are positively necessary for a complete adjudication of the case; and no subpoena shall issue for any witness unless the defendant is in custody or on bail, or the clerk or magistrate shall have good reason to believe that he will be apprehended. Sub-

Honorable Alden S. Lance

poenas may be issued to different counties at the same time, but all the witnesses ordered at one time, and living in the same county, shall be included in one subpoena."

It will be noted that the above sections set forth three situations in which witness fees will be paid, to wit, when the names are endorsed upon the indictment or information; where the prosecuting attorney orders in writing subpoenas to be issued; and when the prosecuting attorney shall file an affidavit that witnesses ordered by him are necessary to a complete adjudication of the cases. Therefore the costs of rebuttal witnesses used by the state would be paid by the state in the last two situations set forth above although the names of such witnesses were not endorsed upon the indictment or information.

CONCLUSION

It is the conclusion of this department that the fees of witnesses for a defendant who has taken his appeal as a poor person are not paid by the state or county.

It is the further opinion of this department that the fees of rebuttal witnesses used by the state, whose names have not been endorsed upon the information, are taxable against the state where the prosecuting attorney in writing orders subpoenas to be issued to them and when the prosecuting attorney shall file an affidavit that witnesses ordered by him are necessary to a complete adjudication of the case.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours

John M. Dalton
Attorney General

HPW:lc

1 enclosure

INSURANCE:



Insurance companies subject to Sections 379.205 to 379.310 RSMo 1949, are not exempt from the provisions of Section 376.400 RSMo 1949 when issuing regular accident and health policies, and such companies may include a death benefit payment in comprehensive automobile casualty and liability policy without making such policy a regular accident and health policy required to be filed and approved under Section 376.400, RSMo 1949.

March 7, 1956

Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Leggett:

This opinion is rendered in reply to your inquiry reading as follows:

"The captioned insurance company, organized and doing business under the provisions of Sections 379.205 to 379.310, inclusive, Revised Statutes of Missouri, 1949, has filed with this Division for use in Missouri the captioned forms.

"Form No. A-1.10 is a 'Combination Automobile Insurance Policy' providing under Part III, Coverage D, indemnity for the death of the insured (defined as including only first named insured and his spouse) resulting from bodily injury caused by accident and sustained by the insured 'While in or upon, entering or alighting from, or from being struck by an automobile'.

"Form No. A-2.11 is the declarations form to be used in connection with Form No. A-1.10.

"We are also inclosing Memoranda submitted to this office by the captioned company concerning their authority to provide the accidental death benefit in a policy which does

Honorable C. Lawrence Leggett

not conform to the provisions of Section 376.400, Revised Statutes of Missouri, 1949, governing policies of accident and health insurance, for your information.

"It is the contention of the company that this accidental death benefit is not governed by Section 376.400, Revised Statutes of Missouri, 1949, on two grounds:

"First: That the M.F.A. Mutual Insurance Company, by virtue of the exemption contained in Section 379.310, Revised Statutes of Missouri, 1949, is not subject to said Section 376.400; and second: that the accidental death indemnity is 'Automobile Insurance' under Paragraph (3) of Section 379.230, Revised Statutes of Missouri, 1949, and as automobile insurance is not subject to the said Section 376.400, Revised Statutes of Missouri, 1949.

"I respectfully request your official opinion on the following questions in connection with the submission of the captioned forms.

"1. Is the M.F.A. Mutual Insurance Company, a corporation organized and existing under Sections 379.205 to 379.310, inclusive, Revised Statutes of Missouri, 1949, exempt from the provisions of Section 376.400, Revised Statutes of Missouri, 1949?

"2. Is the accidental death indemnity afforded under Part III, Coverage D, of the inclosed captioned policy accident insurance subject to the provisions of Section 376.400, Revised Statutes of Missouri, 1949, or is it 'Automobile Insurance' under Paragraph (3) of Section 379.230, Revised Statutes of Missouri and, as such, not governed by the provisions of Section 376.400, Revised Statutes of Missouri, 1949?"

Honorable C. Lawrence Leggett

It is conceded that the basic law of incorporation of the company in question is found at Sections 379.205 to 379.310 RSMo 1949. The general exemption statute applicable to such company, which it is contended relieves it of compliance with Section 376.400 RSMo 1949, is Section 379.310, which provides:

"Except as provided herein, or as such companies may be hereafter expressly designated in any other law, insurance companies organized or admitted to do business in this state under sections 379.205 to 379.310 shall not be subject to any other law of this state governing insurance companies."

Attention is immediately directed to Section 379.275 RSMo 1949, of the basic law of incorporation of this company, and such statute provides:

"1. Any law requiring that policies be countersigned and delivered through a resident agent shall not apply to any policy of such mutual company on which no commission shall be paid to any local agent.

"2. Such mutual company may insert in any form of policy prescribed by the law of this state any provisions or conditions required by its plan of insurance which are not inconsistent or in conflict with any law of this state."

Under Section 376.400 RSMo 1949, the Superintendent of the Division of Insurance and the Attorney General are directed to approve accident and health policies. This statute is of considerable length, but it is deemed necessary, in this instance, to quote its complete language as follows:

"1. No policy of insurance against loss or damage from sickness or the bodily injury or death of the insured by accident, and no riders, endorsements, supplementary or additional terms and provisions shall be issued or delivered to any person in this state by any company doing business in this state under the provisions of the

Honorable C. Lawrence Leggett

insurance laws of the state of Missouri until a copy of the form thereof has been filed with the superintendent of the insurance division for at least a period of thirty days unless before the expiration of said thirty days the superintendent of the insurance division and the attorney general of the state of Missouri shall have approved of the same in writing.

"2. If during such period of thirty days or at any time thereafter, as provided in this section, the superintendent of the insurance division or attorney general, in writing, disapprove of the form of such policy, it shall be unlawful for such policy to be issued or delivered in this state by the company filing same.

"3. If the superintendent of the insurance division or the attorney general are unable, by virtue of their other duties, to determine whether or not they shall approve or disapprove the form of such policies within the thirty-day period herein provided, the superintendent of the insurance division may extend the time within which they may approve or disapprove to a period not to exceed ninety days from the date of filing such form, and the company filing such form or forms shall be notified by the superintendent, in writing, of such extension of time.

"4. The superintendent of the insurance division and the attorney general shall not approve such forms of policies unless every part is plainly printed in type not smaller than long primer or ten point type nor unless there is printed on the first page thereof and on its filing back in type not smaller than eighteen point or great primer a brief description of the policy; nor unless the exceptions be printed with the same prominence as the benefits to which such exceptions apply.

Honorable C. Lawrence Leggett

"5. If the superintendent fails, within the thirty-day period of time or within the extended period, as herein provided, to notify the company in writing of his disapproval, then the company may issue such form of policy, but nothing herein contained shall permit an insurance company to issue policies in violation of other provisions of the insurance laws of this state, and nothing herein shall bar the superintendent and attorney general from, at any time thereafter, disapproving such form after giving the company notice thereof and a hearing thereon.

"6. Whenever the superintendent or attorney general disapprove a policy form, as herein provided, the superintendent shall notify the company filing same, in writing, giving the reasons therefor.

"7. The superintendent and attorney general are hereby directed to approve for use in this state only policies conforming to the express provisions of the insurance laws of Missouri, and only such words, phrases, figures, terms and conditions of policy forms, riders, endorsements, supplementary or additional terms and provisions affecting policies or agreements for insurance which are specific, certain and unambiguous, to meet needed requirements for the protection of lives and property of assureds.

"8. Any policy filed with the superintendent pursuant to this section, not conforming to the requirements herein, shall be, by the superintendent and attorney general, disapproved.

"9. Nothing in this section contained shall be held to apply to life insurance, endowment or annuity contracts, or contracts supplementary thereto."

Honorable C. Lawrence Leggett

It is concluded that Section 376.400 RSMo 1949, quoted above is within the phrase "any law of this state" as such language is used in Section 379.275 RSMo 1949, supra, and companies organized under and subject to Sections 379.205 to 379.310 RSMo 1949 are not exempt from Section 376.400 RSMo 1949 when writing a general accident and health policy. This conclusion is further supported by language contained in the general exemption statute, Section 379.310 RSMo 1949, applicable to the type of company in question, such statute reading as follows:

"Except as provided herein, or as such companies may be hereafter expressly designated in any other law, insurance companies organized or admitted to do business in this state under sections 379.205 to 379.310 shall not be subject to any other law of this state governing insurance companies." (Emphasis supplied).

The phrase "except as provided herein" found in Section 379.310 RSMo 1949, quoted above, has reference to the basic law of incorporation of the company with which we are dealing, and is a positive directive to refer back to Section 379.275 RSMo 1949 of such law of incorporation which directs that such a company may insert in its policies only those provisions or conditions which are not in conflict with "any law of this state." We now pass to the second and more difficult question posed in the inquiry, which reads:

"2. Is the accidental death indemnity afforded under Part III, Coverage D, of the inclosed captioned policy accident insurance subject to the provisions of Section 376.400 Revised Statutes of Missouri, 1949, or is it 'Automobile Insurance' under Paragraph (3) of Section 379.230, Revised Statutes of Missouri and, as such, not governed by the provisions of Section 376.400 Revised Statutes of Missouri, 1949?"

Part III, Coverage D, referred to above provides:

"1. COVERAGE D--Accidental Death--MFA Mutual will pay the principal sum stated in the Declarations in the event of the death of the insured, which shall result directly and independently of all other causes from bodily

Honorable C. Lawrence Leggett

injury caused by accident and sustained by the first named insured or spouse, while in or upon, entering or alighting from, or through being struck by an automobile, provided the death shall occur within one year after the date of the accident.

"2. Definition of Insured--With respect to the insurance afforded under Coverage D, the unqualified word 'insured' includes only the first named insured and his spouse.

"3. Payment of Benefits--The indemnity for the death of the insured, shall be payable to the surviving spouse of such deceased person and if there is no surviving spouse, to the estate of said deceased person.

"4. Exclusions--Coverage D does not apply:

"a. To death resulting from bodily injury sustained while in or upon, entering or alighting from a home, office, store or display trailer;

"b. To death caused by or resulting from disease;

"c. To suicide, committed while sane or insane;

"d. To death due to war or invasion."

Subparagraph 1 of Section 376.400 RSMo 1949 causes the statute to be applicable to a " * * policy of insurance against loss or damage from sickness or the bodily injury or death of the insured by accident, * * *." The form of policy which is the subject of this opinion is designated as a "Combination Automobile Insurance Policy."

Without descending into detail in discussing each of the insuring agreements found in the policy, it will suffice to say that the language of all such agreements establishes the fact that the contract of insurance is intended to cover an

Honorable C. Lawrence Leggett

indemnifiable loss, or liability which will occur only by reason of the insured's ownership or use of an automobile. This fact immediately distinguishes the contract from a "policy of insurance against loss or damage from sickness or the bodily injury or death of the insured by accident," as such language is used in Section 376.400 RSMo 1949, for such statute does not purport to further subdivide insurance against accidental bodily injury or death into accidental loss or liability for bodily injury or death from causes solely related to the use and ownership of a motor vehicle. This distinction becomes important when we consider language found in Section 379.230 RSMo 1949, which statute outlines the types of insurance which the company in question may write, and such statute reads as follows:

"Any company organized under the provisions of sections 379.205 to 379.310 is empowered and authorized to make contracts of insurance or to reinsure or accept reinsurance on any portion thereof, to the extent specified in its articles for the kinds of insurance following:

"(1) Liability insurance. Against loss, expense or liability by reason of bodily injury or death by accident, disability, sickness or disease suffered by others for which the insured may be liable or have assumed liability, including workmen's compensation;

"(2) Disability insurance. Against bodily injury or death by accident and disability by sickness;

"(3) Automobile insurance. Against any or all loss, expense and liability resulting from the ownership, maintenance or use of any automobile or other vehicle: provided, no policies shall be issued under this subsection against the hazard of fire alone;

"(4) Steam boiler insurance. Against loss or liability to persons or property resulting from explosions or accidents to boilers, containers, pipes, engines, fly wheels, elevators and machinery in connection therewith and against loss of use and occupancy

Honorable C. Lawrence Leggett

caused thereby and to make inspection and issue certificates of inspection thereon;

"(5) Use and occupancy insurance. Against loss from interruption of trade or business or loss of rents which may be the result of any accident or casualty;

"(6) Miscellaneous insurance. Against loss or damage by any hazard upon any risk not provided for in this section, which is not prohibited by statute or at common law from being the subject of insurance, excepting life insurance and fire insurance."

Insurance companies formed under Sections 379.205 to 379.310 RSMo 1949, have long been referred to in this state as "miscellaneous mutual casualty companies." The descriptive language in Section 379.230, supra, applicable to risks to be covered clearly discloses a "casualty line" of coverage, as distinguished from a general accident and health policy. At 44 C.J.S., Insurance, Sec. 6, we find the term "casualty insurance" treated in the following language:

"Although 'casualty insurance' is a term of quite frequent use, it cannot be said that its definition has been very accurately settled by the courts. It is commonly held to include those forms of indemnity providing for payment for loss or damage to property, except from fire or the elements, resulting from accident or some such unanticipated contingency, and for loss through accident, or casualties resulting in bodily injury or death. The term, however, is more properly applied to insurance against the effects of accidents resulting in injuries to property."

In Vol. 1, Couch On Insurance, Sec. 13, we find the following:

Honorable C. Lawrence Leggett

"In some jurisdictions a distinction, largely based on statutes, is drawn between accident and casualty insurance, the former being held to relate to accidents resulting in bodily injury or death, and the latter to property losses resulting from accident or casualty, such as boiler, plate glass, injury to property by strikes, etc. But as a general rule 'casualty insurance' covers accidental injury both to persons and to property. In fact casualty insurance has been defined as an insurance against loss through accidents or casualties resulting in bodily injury or death."

"Automobile insurance" is broadly defined in Section 379.230, supra; and when we consider the terms "liability insurance," "disability insurance" and "miscellaneous insurance" as they are defined in such statute, it is evident that a company subject to such statute has wide latitude in its coverages, subject to the positive prohibition against writing "life insurance" and "fire insurance." It then appears that the second question posed in the request for this opinion may be thus resolved:

Will the inclusion of a death benefit payment to the insured in a comprehensive automobile casualty and disability policy issued under authority contained in Section 379.230 RSMo 1949, change such policy into a regular accident and health policy required to be filed with the Superintendent of the Division of Insurance under Section 376.400 RSMo 1949?

In resolving the above stated question we draw an analogy between the situation at hand and one wherein the courts have construed the question as to whether disability benefits in a life insurance policy are to be considered as accident and health insurance. In the case of *O'Brien v. General American Life Insurance Company*, 103 N.E. (2d) 193, 345 Ill. App. 264, 1.c. 271, the Court, in 1951, spoke as follows:

Honorable C. Lawrence Leggett

"In a number of cases, courts have construed the question as to whether disability benefits in a life insurance policy are to be considered as accident and health insurance. This has arisen principally in cases where the insured having a life insurance policy containing a disability provision, fails to set it forth in answer to a pertinent question when making application for accident and health insurance. Bowles v. Mutual Benefit Health & Accident Ass'n (C. C. A. 4th, 1938), 99 F. (2d) 44, 119 A. L. R. 756; Purcell v. Washington Fidelity Nat. Ins. Co., 141 Ore. 98, 16 P. (2d) 639; Mutual Benefit Health & Accident Ass'n of Omaha v. Bell, 49 Ga. App. 640, 176 S. E. 124. In Bowles v. Mutual Benefit Health & Accident Ass'n, supra, the insurance company defended against a claim on a health and accident policy on the ground that the insured failed to disclose that he had other such policies. Two life policies had been issued to him by the Equitable Life Insurance Company of Iowa. The court held that although the life insurance policies contained a provision for double indemnity and liability, they were still life insurance policies and insured was not under duty to disclose them. In Mutual Benefit Health & Accident Ass'n of Omaha v. Bell, supra, the court held that the fact that the life insurance policies contained total disability clauses did not render them health and accident policies. The other cases were to the same effect. In the Illinois case cited, Julius v. Metropolitan Life Insurance Co., 299 Ill. 343, a life insurance policy provided that if other policies of insurance were in force at the time of death, the amount payable should not exceed the amount specified, less the total amount payable on the other policies by whomsoever issued. Insured was accidentally killed and at the time of his death held an accident policy which his beneficiary collected. It was contended that the amount of this accident policy should be deducted from the life insurance. The Supreme Court of this State held that accident or health insurance is not life

Honorable C. Lawrence Leggett

insurance and although the amount was payable on death, it should not be deducted from the amount of the life insurance. This conclusion was arrived at even though the words of the policy covered all insurance and was not restricted to life insurance.* * *

In holding in this opinion that an insurance company subject to the provisions of Sections 379.205 to 379.310 RSMo 1949 may include in its comprehensive automobile casualty and liability policy a death benefit payment to the insured when death results from an accident growing out of the ownership or use of such automobile, without changing the character of such policy to that of a regular accident and health policy required to be filed and approved under Section 376.400 RSMo 1949, such ruling will not apply if the policy on its face discloses that it is a regular accident and health policy.

CONCLUSION

It is the opinion of this office that insurance companies subject to the provisions of Sections 379.205 to 379.310 RSMo 1949, are not exempt from the provisions of Section 376.400 RSMo 1949 when issuing regular accident and health policies, and such policies are required to be filed with, and approved by the Superintendent of the Division of Insurance and the Attorney General, and such companies may include in their comprehensive automobile casualty and liability policies a death benefit payment to the insured when death results from an accident growing out of the ownership or use of such automobile, without changing the character of such policy to that of a regular accident and health policy required to be filed and approved under Section 376.400 RSMo 1949, so long as the policies on their face do not disclose that they are regular accident and health policies.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

INSURANCE: Articles of Incorporation of Consumers Life Insurance Company.



May 4, 1956

Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Department of Business and Administration
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Receipt is acknowledged of your letter of May 4th with which you submitted to this office an executed copy of declaration of intention of original incorporators of the proposed Consumers Life Insurance Company, which declaration of intention also included a copy of the articles of incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1949. Also forwarded with your formal request for an opinion concerning the documents heretofore referred to was proof of publication of same as required by Section 376.070 RSMo 1949.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070 RSMo 1949, and it is the opinion of this office that the same are found to be in accordance with provisions of Chapter 376, RSMo 1949, and not inconsistent with the constitution and laws of this state and the United States.

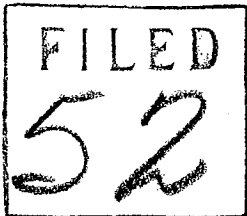
The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Julian L. O'Nalley.

Very truly yours,

John M. Dalton
Attorney General

JLO'M:hw

INSURANCE: Articles of Incorporation of Automobile Owners
Association Insurance Company.



July 24, 1956

Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Department of Business and Administration
Jefferson Building
Jefferson City, Missouri

Dear Sir:

This opinion affects your submission to this office of an executed copy of declaration of intention of original incorporators of the proposed Automobile Owners Association Insurance Company, which declaration of intention also included a copy of the articles of incorporation of such company to be formed under the provisions of Chapter 376 RSMo 1949. Also forwarded with your formal request for an opinion concerning the documents heretofore referred to was proof of publication of the same as required by Section 376.070 RSMo 1949.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070 RSMo 1949. It has been noticed that though this proposed regular life company is formed under Chapter 376 RSMo 1949, the documents examined have, in several instances, referred to Sections 376.010 to 376.760, rather than to Sections 376.010 to 376.670. When construing the documents in their entirety, supported by an affidavit dated July 20, 1951, it must be reasonably concluded that only a typographical error is evident.

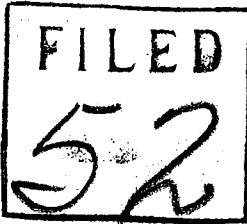
It is the opinion of this office that the documents referred to above comply with the provisions of Sections 376.010 to 376.670 RSMo 1949, and are not inconsistent with the constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Julian L. O'Malley.

Very truly yours,

John M. Dalton
Attorney General

INSURANCE: Proposed Death Benefit Plan of V.F.W. involves transacting life insurance business, and licensing provisions of Missouri Insurance Code must be met.



August 1, 1956

Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Leggett: -

The following opinion is rendered in reply to your recent inquiry concerning a proposed Death Benefit Plan which the Veterans of Foreign Wars of the United States is considering. You have asked if the proposed plan constitutes the business of insurance under the laws of Missouri, requiring formation of an insurance company and license by the Division of Insurance. Reference hereinafter made in this opinion to the corporation in question will be to V.F.W.

Section 375.310 RSMo 1949 is a provision of Missouri's insurance code which must be considered in this case. It provides, in part, as follows:

"Any association of individuals, and any corporation transacting in this state any insurance business, without being authorized by the superintendent of the insurance division of this state so to do, or after the authority so to do has been suspended, revoked, or has expired, shall be liable to a penalty of two hundred and fifty dollars for each offense,
* * *."

The V.F.W. Death Benefit Plan is outlined in the proposed amendments to Section 605 of National By-Laws of V.F.W. submitted with the request for this opinion, such proposed amendments reading as follows:

"Section 605 - National Dues

"Amend Section 605, National By-Laws, by deleting the figures '\$1.25' in line 1 of paragraph 1 and inserting in lieu thereof the figures '\$2.25'.

Honorable C. Lawrence Leggett

"Amend Section 605 further by deleting the figures '\$1.25' in line 4 of paragraph 2 and inserting in lieu thereof the figures '\$2.25'.

"Amend Section 605 further by adding the following sub-section entitled 'Death Benefit Plan':

"Death Benefit Plan - There shall be instituted the V.F.W. Death Benefit Plan to be administered under the supervision of a committee consisting of the Comander-in-Chief, Quartermaster General and Adjutant General as ex-officio members and five members elected by the National Council of Administration to serve staggered terms of five years. Members of the original committee chosen by the National Council of Administration shall serve for terms of one, two, three, four and five years respectively and thereafter each member elected by the National Council of Administration shall serve for a term of five years.

"Commencing on January 1, 1957, every member shall be privileged to designate a beneficiary to whom the National Organization will pay the sum of One Hundred Dollars (\$100.00) upon receipt of proof of death of that member while in good standing. An individual whose membership is terminated by reason of ineligibility shall forfeit his dues as well as any benefits payable under this Section.

"One Dollar (\$1.00) of each member's annual dues shall be allocated to the Death Benefit Plan. Said monies shall be used solely for payment of benefits hereunder, the balance being held in reserve. Costs of administration shall not exceed five per cent (5%) of the monies paid into the Death Benefit Fund in any calendar year."

Will the foregoing plan, if carried out in Missouri, constitute the doing of insurance business? Missouri statutes do not define a "contract of insurance." The essential elements

Honorable C. Lawrence Leggett

of a contract of insurance are alluded to in the following language from State ex rel. Inter-Insurance Auxiliary Company v. Revelle, 165 S.W. 1084, 257 Mo. 529, 1.c. 535:

"The essential elements of a contract of insurance are an agreement, oral or written, whereby for a legal consideration the promisor undertakes to indemnify the promisee if he shall suffer a specified loss."

The foregoing definition of a "contract of insurance" is indeed broad and may convey the idea that "indemnity" is the principal feature in all insurance. However, in treating of the subject of life insurance, we find the following from Cooley's Briefs On Insurance, Second Edition, Vol. 1, page 27:

"In view of the general opinion that life insurance contracts are not contracts of indemnity, and that contracts of accident insurance are not always contracts of indemnity, a definition of life insurance, to be acceptable, should, perhaps, avoid making indemnity an essential feature. This requirement is well met by the definition of a contract of life insurance given by Justice Gray in Commonwealth v. Wetherbee, 105 Mass. 149. A contract of insurance is an agreement by which one party for a consideration, which is usually paid in money, either in one sum or at different times during the continuance of the risk, promises to make a certain payment of money, on the destruction or injury of something in which the other party has an interest. In fire and marine insurance, the thing insured is property; in life or accident insurance, it is the life or the health of a person. All that is requisite to constitute such a contract is the payment of the consideration by the one and the promise of the other to pay the amount of the insurance upon the happening of injury to the subject by the contingency contemplated in the contract. This statement has been approved by the courts and writers as the clearest definition of

Honorable C. Lawrence Leggett

life insurance. The Court of Appeals of New York in an early case (St. John v. American Mut. Life Ins. Co., 13 N.Y. 31, 64 Am. Dec. 529) thus defines life insurance: 'An insurance upon the life of an individual is a contract by which the insurer, for a certain sum of money or premium proportioned to the age, health, profession, and other circumstances of the person whose life is insured, engages that, if such person shall die within the period limited in the policy, the insurer will pay the sum specified in the policy, according to the terms thereof, to the person in whose favor such policy is granted.'

Couch On Insurance, Vol. 1, Sec. 34, treats of life insurance in the following language:

"Life insurance has been defined by statute in some of the states, but in the absence of statute it is a contract dependent upon human life, whereby one for a stipulated consideration, customarily called a premium, agrees to pay another a certain sum of money upon the happening of a given contingency, usually death, or upon the termination of a specified period."

The Death Benefit Plan proposed would seem to be well within the worthy objects set forth in Article 1 of the Constitution of V.F.W. Language from the brief of the Attorney General of Missouri in the case of State ex rel. Attorney General v. Merchants' Exchange Mutual Benevolent Society, 72 Mo. 146, l.c. 153, seems appropriate to the question and a portion of such language is adopted as follows:

"All insurance was originally based on the idea of benevolence. 3 Kent. Sec. 366; 2 Marsh, Ins. p. 766. If, then, defendants are exercising charity and benevolence by means of contracts for the payment of money upon the death of a member, they are doing an insurance business. It matters not how those contracts are evidenced, what name is given to them, whether evidenced by a certificate of membership, or the provisions of the articles of association, by by-laws, or by rules adopted by the society, courts will

Honorable C. Lawrence Leggett

look at what the business and the mode of doing it actually is, and, irrespective of forms or names, or evasive and cunningly promulgated motives, the argus eyes of justice will penetrate all these and look at the substance of the thing itself."

Under the Death Benefit Plan being construed it is clear that one dollar of the annual membership fee in the V.F.W. is to be set aside to cover death benefit payments; that payment of the death benefit is contingent on death of a member of V.F.W. while in good standing in the organization; that members paying their annual dues will be fully cognizant of the purpose of the corporation to pay the death benefit out of funds accumulated from a specified portion of the membership fee, and that the protection afforded, though small, may be lost if a member fails in any year to pay his full dues. Under the definitions of insurance and life insurance heretofore cited, it must reasonably be concluded that the Death Benefit Plan being construed, if put into operation in Missouri, will result in the V.F.W. transacting life insurance business with the consequent requirement that the corporation comply with the licensing provisions of Missouri's Insurance Code.

CONCLUSION

It is the opinion of this office that the Death Benefit Plan proposed by the Veterans of Foreign Wars of the United States, and fully described in the foregoing opinion, will involve the transacting of life insurance business in Missouri and require compliance with the licensing provisions of Missouri's Insurance Code.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO'M:hw

INSURANCE: Articles of Incorporation of Heuer-Williams
Mutual Insurance Company.



November 15, 1956

Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Pursuant to your request of November 9, 1956, an examination has been made of an executed copy of Declaration of Intention by original incorporators, together with proof of publication of the same, to form an insurance company to be known as Heuer-Williams Mutual Insurance Company.

It is the opinion of this office that the documents referred to in the preceding paragraph are in conformity with Sections 379.010 to 379.160, RSMo 1949, and not inconsistent with the Constitution and Laws of this State and of the United States.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO:M:mr

ELECTION:
COURTS:
CAPE GIRARDEAU COURT
OF COMMON PLEAS:
NOMINATIONS:

Special election to fill vacancy in office of judge of Cape Girardeau Court of Common Pleas may be called for any time at discretion of Governor; not less than ten days' notice to be given; candidates may be nominated by party judicial committees or by petitions of nomination; election to be conducted under Chapter 111, RSMo 1949.



January 10, 1956

Honorable Stephen N. Limbaugh
Prosecuting Attorney
Cape Girardeau County
Cape Girardeau, Missouri

Dear Mr. Limbaugh:

This is in response to your request for opinion dated December 10, 1955, which reads as follows:

"Honorable J. Henry Caruthers, Judge of the Cape Girardeau Court of Common Pleas, Cape Girardeau, Missouri died last week and under Sections 480.170 and 480.180 Revised Statutes of Missouri, 1949, the Governor is required to call a special election for the purpose of filling the vacancy.

"It is my understanding that the Governor has already asked for a ruling from your office for a procedure to be followed in the conducting of this election and if such an opinion has been rendered, I should appreciate receiving a copy of it at your convenience.

"If you have not rendered such an opinion, I would appreciate it if you would do so setting out the procedure to be followed in the conduction of this election, how the candidates are to be chosen, the required notice of the candidates, if any, to the inhabitants of the county, the date when this could be held and the general procedure that should be followed in this respect.

"It would simplify matters if the election could be held at the same time the bond issue is to be voted on.

"I would appreciate receiving your opinion in this regard at your earliest convenience."

Honorable Stephen N. Limbaugh

Section 480.170, RSMo 1949, to which you refer, reads as follows:

"If any vacancy shall happen in the office of judge, by death, resignation, removal or otherwise, the governor shall, upon being satisfied that a vacancy exists, issue a writ of election to fill said vacancy; but every election to fill a vacancy shall be for residue of the term only."

As for the date on which this election can be held, about which you inquire, it is clear from this section that this is a matter resting solely within the discretion of the Governor and may be called for any date which he may decide upon.

The notice to be given is provided for in Section 111.210, RSMo 1949. That section reads as follows:

"When the governor issues a writ of election to fill any vacancy, he shall mention in said writ how many days, to be not less than ten, the sheriff shall give notice thereof."

The manner of choosing candidates for the election to fill a vacancy of this sort is not expressly provided for. However, on similar questions this office has previously rendered opinions and we believe the reasoning contained therein is equally applicable here.

In an opinion directed to David P. Plummer under date of November 16, 1950, copy enclosed, concerning nominations for a special election to fill a vacancy in the office of sheriff, it was held that the county party committees were authorized to make such nominations. The Plummer opinion is cited for this proposition only.

Again, in an opinion directed to William E. Tipton under date of September 6, 1955, copy enclosed, with regard to a special election to fill a vacancy in the office of state senator, it was held that the senatorial party committees were authorized to nominate candidates.

Since the jurisdiction of the Cape Girardeau Court of Common Pleas is coextensive with the county of Cape Girardeau (Sections 480.010, 480.020, RSMo 1949), the judicial committee; under Section 120.810 (3), is the county committee and is the body authorized to nominate candidates for this election.

Honorable Stephen N. Limbaugh

Although the Plummer opinion held that candidates could also be nominated by certificates of nomination signed by the requisite number of electors under Sections 120.01 - 120.06, House Bill No. 2057, 65th General Assembly, Sections 120.010 - 120.060, RSMo 1949, it is to be noted that, as pointed out in the Tipton opinion, Sections 120.010 - 120.080, RSMo 1949, were held in State ex rel. Preisler v. Toberman, Mo., 269 SW 2d 753, to have been by implication repealed by the enactment of Sections 120.140 - 120.230, RSMo, Cum. Supp. 1955. Inasmuch as sufficient time did not remain before the election for the method of nomination provided in Sections 120.140 - 120.230, supra, to be employed in that instance, the question was not passed on in that opinion. It was further held in a later opinion directed to John Clark under date of September 29, 1955, copy enclosed, that the fact that there was not sufficient time for independent candidates to file nominating petitions did not invalidate the call for special election.

We now rule, however, that if the Governor's call for the election does allow sufficient time for the method of nomination provided for in Sections 120.140 - 120.230, RSMo, Cum. Supp. 1955, to be used, that method of nomination may be employed also.

As to the conduct of the election and the general procedure to be followed, nothing is expressly provided by statute. However, Section 111.010, RSMo 1949, seems to make that chapter applicable to the conduct of all elections except those expressly excepted therefrom. Coupling this with the fact that some express provisions are made in that chapter for special elections to fill vacancies (Sections 111.200, 111.210, RSMo 1949), we are of the opinion that the Legislature intended for a special election to fill a vacancy in the office of Judge of the Cape Girardeau Court of Common Pleas to be conducted in accordance with Chapter 111, RSMo 1949, Cum. Supp. 1955.

CONCLUSION

It is the opinion of this office with regard to the special election to fill the vacancy existing in the office of judge of the Cape Girardeau Court of Common Pleas that:

1. The election may be called for any time within the discretion of the Governor;
2. The notice to be given is that specified in Section 111.200, RSMo 1949, i.e., not less than ten days;
3. Candidates may be nominated by the party judicial committees or by petitions of nomination if sufficient time remains therefor; and

Honorable Stephen N. Limbaugh

4. The general conduct of the election should be that provided for in Chapter 111, RSMo 1949, Cum. Supp. 1955.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWE/ml/bi

Enclosures: 3

COUNTIES: Conveyance by county to State Park Board is supported by adequate consideration where Park Board agrees to maintain and develop land as a part of the state park system.

STATE PARK BOARD:



March 12, 1956

Honorable Stephen N. Limbaugh
Prosecuting Attorney
Cape Girardeau County
102 North Main Street
Cape Girardeau, Missouri

Dear Sir:

We have received your request for an opinion of this office, which request reads as follows:

"I am in receipt of your letter dated February 3rd with a copy of an opinion prepared by your assistant, Will F. Berry, Jr., in regard to the purchase of land by the County of Cape Girardeau for the purpose of establishing a park and thereafter transferring such land to the State Park Association.

"As I interpret your letter and enclosed opinion, it appears that the County of Cape Girardeau may by proper procedure float a bond issue for the purpose of purchasing land to be made into a park. I would like to obtain at this time an opinion from your office concerning what constitutes a valuable consideration which is required for a transfer of real property owned by a county of the State of Missouri to an instrumentality of the state.

"At the present time there is strong sentiment in Cape Girardeau County to call an election to determine whether the people of the county would authorize a bond issue for the purpose of purchasing lands in the northern part of Cape Girardeau County for the purpose of establishing a park. Assuming that this issue would carry and that the bonds

Honorable Stephen N. Limbaugh

were floated and the land purchased by the County, the State Park Board headed by Mr. Charles Boutin, Cape Girardeau, Missouri, has promised to take over such park, redevelop it and spend at least \$25,000.00 to \$35,000.00 per year on redeveloping and maintaining such park for at least ten years. If this is done, it will unquestionably indirectly benefit the people of the County of Cape Girardeau and will directly benefit many business establishments in our county who would receive additional business from the use of the park by persons other than those residing in the county. My question specifically is this: Keeping in mind the assumption that the people of Cape Girardeau would vote favorably on a bond issue to establish a park in Cape Girardeau and keeping in mind that all of the inhabitants of Cape Girardeau would indirectly benefit from the establishment of a State Park in such county and that many persons would directly benefit therefrom and that the State Park Board would spend \$25,000.00 to \$35,000.00 per year for a period of ten years on such park, would these things provide a valuable consideration for the County of Cape Girardeau making a deed of such purchased park to the State Park Board. If your answer is no, what, in your opinion, would constitute valuable consideration for the transferring of real estate in the County of Cape Girardeau to an instrumentality to the State of Missouri? Is the actual money value of such land to be transferred the only thing that would constitute a valuable consideration?

"I do not mean to burden you with the details of our proposed venture here in Cape Girardeau County. However, the sentiment in the county is very much in favor of getting a State Park here and it appears that floating a bond issue is the only way it can be done. The sentiment of many of the people is that the citizens of our county would certainly benefit from a park and they were interested in having this specific question answered as to what constituted valuable consideration in the transfer of real estate from a county to a state instrumentality."

Honorable Stephen N. Limbaugh

The opinion of Mr. Berry, to which you refer in your request, was written to Honorable Scott O. Wright, Prosecuting Attorney of Boone County, on February 11, 1955. The conclusion of that opinion was as follows:

"(1) That a county of the third class may lawfully become indebted, through the issuance of general obligation bonds of such county within the limits and in accordance with the elective requirements of the Constitution and statutes, for the purpose of acquiring real property to be used as a park and recreational area; and

"(2) That real property so acquired may thereafter be conveyed for a valuable consideration to an instrumentality of the State of Missouri."

We find no Missouri case dealing with the question of whether or not the undertaking by the State Park Board to develop and maintain the area as a public park would be a "valuable consideration" for the county's transfer of the land. There are no express statutory provisions dealing with the matter. Section 253.090, RSMo, 1955 Supp., dealing with the State Park Board, provides, in part, that "all moneys received * * * from county or municipal sources shall be paid into the state treasury to the credit of the state park fund, which is hereby created." This is the only statutory reference that we find to dealings between counties and the State Park Board. This section does indicate an intention on the part of the Legislature to permit contributions by counties to the State Park Board for park purposes.

The statutory provisions for the transfer of real estate by county courts are found in Chapter 49, RSMo 1949. Section 49.270 provides:

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

Honorable Stephen N. Limbaugh

Section 49.280 provides:

"The county court may, by order, appoint a commissioner to sell and dispose of any real estate belonging to their county; and the deed of such commissioner, under his proper hand and seal, for and in behalf of such county, duly acknowledged and recorded, shall be sufficient to convey to the purchaser all the right, title, interest and estate which the county may then have in or to the premises so conveyed."

The case of Washington County v. Lynn Shelton Post No. 27, etc., 201 Ark. 301, 144 SW2d 20, involved a conveyance by the county of land to an American Legion Post which had agreed to construct on the land a building for the use of the post and the county. The transfer was attacked on the grounds that it was without consideration. From the report of the decision, no monetary consideration appears to have been paid to the county by the American Legion Post. In deciding the case the court stated, 144 SW2d 1.c. 21:

"The appellant contends that there was no consideration for the deed, but it is admitted that the building is being erected, and that there is storage space for the use of Washington County, and an auditorium being built for the benefit of the citizens of Washington County, and there is no claim of fraud.

"Under the law in this state, the control and management of all county property is placed in the county court, and authority is conferred on that court to sell and cause to be conveyed any real estate or personal property belonging to the county. Section 2478 of Pope's Digest reads as follows: 'The county court may, by an order to be entered on the minutes of said court, appoint a commissioner to sell and dispose of any real estate of the county, and the deed of such commissioner, under his hand, for and on behalf of such county, duly acknowledged and recorded, shall be sufficient, to all intents and purposes,

Honorable Stephen N. Limbaugh

to convey to the purchaser all the right, title, interest and estate whatever which the county may then have in and to the premises to be conveyed.'

"The conveyance here involved was made pursuant to and in strict compliance with the terms of the statute above quoted, and the attack here relates only to the consideration. The above-quoted statute confers abundant power upon the county court to sell and convey property of the county not held in trust for specific purposes. The county court, having the power to direct the sale, the consideration can only be inquired into for the purpose of establishing fraud, and there is no charge of fraud involved in this case. The decision below was upon the sufficiency of the allegations and the evidence. So far as the allegations in the pleadings and the evidence are concerned, the transaction was inspired by the best motives and purposes on the part of those who participated therein, and nothing short of fraud, or such gross inadequacy as will be equivalent to fraud, is sufficient to invalidate the order of the county court directing the conveyance. The consideration need not be in money, but the county court, in exercising its power, may determine what is to the best interest of the county."

The court concluded, 144 SW2d 1.c. 22:

"Where the county court is by statute clothed with the power to sell and dispose of county property not dedicated to specific use, it may determine what consideration shall be accepted, and unless there is fraud, the judgment of the county court will not be disturbed."

In the case of Little Rock Chamber of Commerce v. Pulaski County, 113 Ark. 439, 168 SW 849, 1.c. 850, the court stated, in discussing a similar question:

"If the county has the power to take the public advantage into consideration at all, it has the right to base the conveyance entirely upon that as the moving consideration."

Honorable Stephen N. Limbaugh

Under the holding of the Arkansas cases, which are based upon statutes quite similar to those found in Missouri, the proposed undertaking by the State Park Board would be a valuable and sufficient consideration if the land has not been dedicated to a specific use. Therefore, the question would remain as to whether or not the land proposed to be transferred to the state would have been so dedicated, thereby making the holdings of the Arkansas cases inapplicable.

The case of Montgomery County v. Maryland-Washington Metropolitan District, 202 Md. 293, 96 A2d 353, involved the validity of a conveyance by a county to a planning commission for the establishment of recreational facilities. The land had previously been purchased by the county from the proceeds of a bond issue which provided that its proceeds "shall be used exclusively * * * for the purpose of acquiring by purchase or condemnation a new site or additional land upon which to construct a new office buildings to house necessary offices of the County Commissioners, quarters for the Montgomery County Police and other necessary county activities, and * * * for the purpose of building or constructing such building." The land was purchased but the particular tract involved had never been used for any such purposes. It does not appear from the report of the decision in the case whether or not the particular tract involved was an excess tract or whether it was the only area which had been purchased for the purpose and no further action taken regarding it. One of the questions before the court in the case was whether or not the property had been impressed with a public trust. With regard to that matter, the court stated, 97 A2d 357:

"Despite statements of counsel at the hearing in this court and in the brief of an amicus curiae, that there had been some public use of the Armory Lot as a playground, the Bill of Complaint alleges no public use for the original purpose of an office building site or for a playground or any other public purpose. This, however, is not the real basis of the County's contention. Its actual contention is that when the lot was bought with the proceeds of a bond issue authorizing a site, building and furnishings for county offices, this was sufficient to constitute a holding in public trust. It is asserted that such a trust cannot be terminated by sale or otherwise even when the lot is no longer required for the intended purpose, without special legislative sanction.

Honorable Stephen N. Limbaugh

"In 10 McQuillin, Municipal Corporations, par. 28.37, the general rule is laid down that land bought for a public use, if not actually so used, cannot be said to be affected by a public trust, and hence may be sold without special legislative authority. See Kings County Fire Ins. Co. v. Stevens, 101 N.Y. 411, 5 N.E. 353; Fussell-Graham-Alderson Co. v. Forrest City, 145 Ark. 375, 224 S.W. 745; Head-Lipscomb-McCormick Co. v. City of Bristol, 127 Va. 669, 105 S.E. 500, and cases cited by McQuillin."

The court then concluded that, inasmuch as there had been no public use of the land, it should not be regarded as being held in trust for a public use. Under this holding, if the land conveyed to the state should not have actually been used by the county for park purposes, the dedication for a particular purpose referred to in the Arkansas case would be held not to have occurred.

In the Maryland case the court upheld the validity of the conveyance and also considered the question of the sufficiency of the consideration. Again, in this case, it does not appear that any money was paid to the county. Regarding the consideration, the court stated, 96 A2d 1.e. 359:

"V. Nevertheless, an implied power to sell property is not an implied power to make a donative disposition. Consequently, the disposition, unless there is consideration for it, is an ultra vires act because there is no statutory power enabling the County to make a gratuitous disposition, and it has no such implied power. We must turn again to Art. 25, Sec. 10, which authorizes the County Commissioners ' * * to establish and/or maintain, directly or by contract, reasonable facilities for the public recreation. This clearly empowers the County to contract for recreational facilities and the Planning Commission, a state instrument possessed of authority to establish such facilities, is an appropriate agency for this purpose.

"It is the Planning Commission's contention that its resolution and that of the County, made in 1944, respectively containing an offer and an acceptance, gave rise to a valid

Honorable Stephen N. Limbaugh

contract, the consideration for which was the Commissioner's agreement to establish recreational facilities either upon the land conveyed or other land, to be purchased with the proceeds of sale of the former, in the event it was sold. With this we are in accord.

"The form of the engagement between the County and the Commission is unexceptionable. That a public corporation may make a contract by resolution is a proposition for which there is ample authority. Illinois Trust & Savings Bank v. City of Arkansas City, 8 Cir., 76 F. 271, 34 L.R.A. 518; 10 McQuillin, sec. 29.10 (citing numerous authorities).

"There being a valid consideration to support the conveyance made by virtue of the County's implied power to dispose of the Armory Lot, it follows that the deed to the Commission was valid and it passed a title which now cannot be assailed."

There would appear to be another consideration with regard to the problem presented by you in the determination of whether or not the land had been so impressed with a public use as to prevent its transfer to the state. In the Arkansas case the property was conveyed to a nongovernmental agency. Here, however, the land would be conveyed to the state for the same use as upon the original ownership by the county. In the case of Los Angeles County v. Graves, 210 Cal. 21, 290 P. 444, the court upheld the transfer by a county of land acquired by it for park purposes to the state for use and development as a part of the state park system. Again, in that case it does not appear that any monetary consideration was received by the county on the conveyance. The court found some statutory authority for the transfer but further stated that authority would exist in the absence of a statute. In that regard the court stated, 290 P. 1.c. 445:

" * * * Then, again, subdivision 4 of section 4003 of the Political Code provides that a county has power to 'manage and dispose of its property as the interests of its inhabitants may require.' The counties are mere governmental agencies of the state, and the property intrusted to their governmental management is public property, the proprietary interest in

Honorable Stephen N. Limbaugh

which belongs to the public. If there be a legal title in the county, it is a title held in trust for the whole public. In the absence of constitutional restrictions, the Legislature has full control of the property so held by the counties as agencies of the state. Reclamation Dist. v. Superior Court, 171 Cal. 672, 679, 680, 154 P. 845, and cases cited. It would seem to follow, therefore, that no specific grant of power is necessary to enable a county to convey land held by it to the state. * * *

It is our thought that the fact that the land would be used by the state for the same purpose as originally planned by the county and for a purpose for which the county was authorized to purchase and make use of the land would distinguish the situation from that involved in the case of Hogge v. Rowan County Fiscal Court, 313 Ky. 387, 231 SW2d 8. In that case the court held that a county had no authority to purchase land and convey it to the state for the construction of a state police district headquarters. The decision was based on consideration of public policy, the court feeling that such offers to the state might result in the police force headquarters' being located at places which would not best suit the public convenience. The county would, of course, have had no authority to erect and operate a state police headquarters. Here, however, the county could have operated and maintained the park so that the county and the state would each make use of the land for the same purpose.

In view of the foregoing authorities, we feel that in the situation which you have proposed the land, upon the conveyance, would be held by the state for the benefit of the public for use as a public park and there would actually be no change in the character of the public use. Therefore, we believe that a conveyance by the county to the state of the property upon the undertaking by the State Park Board to develop and maintain the property for public park purposes would be a conveyance for an adequate and valuable consideration.

CONCLUSION

Therefore, it is the opinion of this office that the transfer of real property acquired by a county through the issuance of bonds

Honorable Stephen N. Limbaugh

for public park purposes to the State Park Board in return for the undertaking of the Board to develop and maintain the area as a public park would be supported by a valuable and adequate consideration.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

Yours very truly,

JOHN M. DALTON
Attorney General

RRW:ml

DRAINAGE: The making up of the tax books of a drainage district
DISTRICTS: organized in the county court of any county in Mis-
COUNTY: souri, under Chapter 243, RSMo 1949, and the entries
TAX BOOKS: to be made in such tax books by the county clerk should
be in conformity to the directions in subsection 2 of
Section 243.350, Laws of Missouri 1953, pages 538, 539.



April 30, 1956

Honorable Leon McAnally
Prosecuting Attorney
Dunklin County
Kennett, Missouri

Dear Mr. McAnally:

Your request for an opinion from this office reads as follows:

"It will be noted that in Section 2 of the old law, which sets out how the drainage tax books shall be made up, it is stated: 'There shall be set out in properly ruled columns of said book the following: (1) The names of the owners of said land and other property as they appeared in the viewers' report as confirmed; (2) Description of the land and other property'.

"By the laws of 1953, effective 90 days after May 31, 1953, the new law (Section 2) states: 'There shall be set out in properly ruled columns of said book the following: (1) The names of the present owners of said land and other property so far as now known; (2) Description of the land and other property'.

"The first question that we would like to ask is this: Does this mean that the County Clerk in preparing this drainage tax book shall set out: (1) The name of the present owner of the land assessed, and (2) the legal description of his property? Or assuming that the benefits in the drainage district are assessed against 40-acre tracts, does this mean that the Clerk merely sets out the description of the 40 acres and sets out the names of all

Honorable Leon McAnally

persons who own land in that 40 acres without specifying what portion of the 40 acres they own?

"If it is your interpretation that the County Clerk should set out opposite the name of the present owners the legal description of the land that he now owns and the acreage that he now owns, how should his benefits be assessed?

"Should all land in the 40 acres be assessed at the same rate of benefits? For example, suppose A owns the North half of a particular 40 acres and B owns the South half. Will half of the benefits assessed against that 40 acres be assessed against A and the other half against B? Or assuming that the North half is high, sandy land, and the South half is low and wet and is receiving more actual benefits, should a greater portion of the assessment be assessed against the land belonging to B?

"In the event that the Clerk assessed the benefits on the basis of the percentage of land that the owner owns out of the 40 acres, does this amount to a change of the benefits, by the County Clerk?

"In the event that you find that the legal description and the amount of land each owns should be set out opposite his name in the drainage tax books, is it necessary for the County Court as Commissioners of County Court Drainage Districts to make an Order breaking down the benefits to the respective present owners in each individual case or should it be the duty of the Clerk to make this breakdown as per Section 243.350 VAMS as amended by the laws of 1953?

Honorable Leon McAnally

"Under Section 242.490 applying to Circuit Court Drainage Districts, Section 2, the following provision is made: '--- provided, that after all annual installments of said total tax have become due, and thereafter it is only desired and necessary to levy and collect such maintenance tax, the board of supervisors of such drainage district may, by resolution, provide that in the tax books containing the maintenance tax, it shall be sufficient if the several governmental lots, forty-acre tracts, or other subdivisions of land as they appear in the decree of the circuit court organizing said district, be conveniently combined and described together, if contiguous, according to each ownership, and the names of the owners thereof as they may appear in the deed records---'.

"We wonder if it would be possible to apply this provision to the making up of the County Court drainage district tax books, and if so, should the County Court as board of supervisors of the County Court Drainage District pass such a resolution, as a condition precedent to the Clerk's being required to combine said contiguous tracts belonging to the said owners?

"A group of the Township Collectors and County Treasurer and Ex-Officio Collector have requested our County Clerk to make the County Court Drainage District tax books up in the following manner: (1) Name of present owner of land; (2) Legal description of and amount of acreage he owns; (3) Combine all contiguous tracts owned by this owner; (4) Show benefits assessed in proportion to amount the land bears to the 40-acre tract against which original viewers assessed benefits. For example, Mr. A owns 20 acres out of 40;

Honorable Leon McAnally

then one-half of benefits assessed against 40 acres will be assessed against A's 20 acres.

"Little River Drainage District, a Circuit Court organization, is already making its books up in the above form, and while it places a greater burden on the person making up the books, it enables the Collector to give a much better and more efficient service.

"Our County Court and County Clerk feel that we should have your official interpretation of this law before changing the method of making up the books in County Court Drainage Districts."

Section 243.350, RSMo 1949, was not amended by the act of the legislature, Laws of Missouri 1953, page 538. Said section was repealed by Senate Bill 44, and a new section relating to the same subject matter, to be known as Section 243.350, was enacted in lieu thereof. The new section, as enacted, now appears under the same number in 1955 Cumulative Supplement, at pages 507, 8.

The subject matter of said new section, as did the repealed section, relates to the apportionment of the maintenance tax and the annual installment tax of drainage districts organized in county courts in this state in proportion to the benefits assessed. Said new Section 243.350, as it likewise reads at the page citation in said Cumulative Supplement, reads as follows:

"Section 243.350. Apportionment of annual installments - drainage tax book, form - taxes due, when. - 1. Each year the county clerk shall apportion the amount of the annual installment, or the aggregate of the installments which the court has provided shall become due and payable in that year and the maintenance taxes, if any, against the land and other property in the drainage district in proportion to the benefits assessed.

Honorable Leon McAnally

"2. The said annual installment and maintenance taxes when so apportioned shall be extended by the clerk in a well-bound book which shall be designated and endorsed 'Drainage Tax Book of Drainage District Number of County, or Township of County, Missouri, for the year 19. .', which endorsement shall also be written or printed at the top of each page. There shall be set out in properly ruled columns of said book the following:

"(1) The names of the present owners of said land and other property so far as now known;

"(2) Description of the land and other property;

"(3) Amount of said installment or installments of tax levied on the corresponding tract of land or other property;

"(4) Amount of maintenance tax, if any, levied against said tract of land or other property;

"(5) A blank column in which the collector shall record the several amounts as collected by him;

"(6) A blank column in which the collector shall record the date of payment of the different sums;

"(7) A blank column in which the collector shall record the names of the person or persons paying the several amounts, if other than the person whose name appears in column one (1) hereof;

"3. The county clerk shall prepare and deliver the said drainage tax book to the collector of the revenue of the county, or

Honorable Leon McAnally

township, not later than October 31 of each year in which the installment and maintenance taxes, if any, are due and payable, and the said taxes shall become due and be collected during said year at the same time that state and county taxes are due and collected."

Attention is directed in the request to the provisions of subsection 2 in both the old section and the new one, respecting the entries to be made in the drainage tax books when such taxes are extended therein by the clerk, in regard to the form of such entries.

The old statute provided that there should be set out in the tax books the names of the owners of the land assessed with benefits and other property as they appeared in the viewers' report as confirmed. Subsection 2 of said 243.350, the new section, Laws of Missouri 1953, page 538, and in the Cumulative Supplement 1955, pages 507, 508, states that the names of the present owners of said land and other property so far as now known shall be included in such tax books. That change in the method identifying the names of owners of land and other property, as provided in subsection 1 of the new section, 243.350, marks the principal difference between the old and the new sections. There is also noted a minor change in the terms of subsection (7) in the new section in regard to the record entry of the name or names of the person or persons paying the several amounts of taxes, if other than the person whose name appears in column (1). Otherwise, the sections are identical.

We believe the terms of subsection 2 of Section 243.350, Laws of Missouri 1953, pages 538, 539, must be followed in making up the tax books of a county court drainage district in all respects and especially in regard to:

" * * *

"(1) The names of the present owners of said land and other property so far as now known;

"(2) Description of the land and other property;

"(3) Amount of said installment or in-

Honorable Leon McAnally

installments of tax levied on the corresponding tract of land or other property;

"(4) Amount of maintenance tax, if any, levied against said tract of land or other property; * * *."

That section, in providing the method and manner in which tax books of such a drainage district shall be made up and the entries as set out in subsection 2 thereof be made therein does so in order that it may be readily determined by the collector of revenue of the county who are the present owners of the land or other property, so far as now known, describing the land and other property so that not only will it be known what land and how much land or other property any person owns out of the described tract but also the amount of such installment or installments of tax that is levied on the corresponding tract of land or other property (that he owns). The section provides, also, that the amount of maintenance tax, if any, levied against said tract of land or other property be entered in the tax books so that any person who owns all or a part of a described tract of land or other property will know definitely what is required by the levy and the entries as extended in the drainage district tax books to be paid by such owner, and so that the collector of revenue may ascertain from the said district tax books when such tax books are delivered to him by the county clerk on or before October 31 of each year, the amount of taxes, the land owned by him, whether the whole amount levied against all of a described tract owned by him as a tract of forty acres or less, or government subdivisions of sections or other surveys. The land owned by any person who is the present owner should be separately described and separately charged with drainage taxes. For example, if a person is named in the tax books of a county court drainage district as the owner of twenty-five acres out of a forty acre tract he would be required to pay only his share of the installments of the drainage tax and his share of the maintenance tax, if any, percentage-wise, on the amount of acreage he presently owns out of the forty acres or any other amount of described land or other property; and he should be so named in the said drainage district tax books and the land he owns should be so definitely described and charged to show how much taxes he is required to pay.

It is clear that in a proceeding to collect county court drainage district assessment taxes, either annual installment taxes or maintenance taxes, levied against described land or

Honorable Leon McAnally

other property in the district, the collector of revenue could proceed against the owner for only the amount of taxes levied against his land or other property which he actually owned in such sum as he actually owes. The facts constituting the levy and assessment of the correct amount of taxes against his property and accurately described land he owns should, in detail, be set out in the said tax books. This is necessary in order for the collector to determine who is actually responsible for paying the taxes on any tract of land described as a forty acre tract or other description, and who has paid such taxes on any forty acre tract if several persons each own a portion of said land and the facts were shown how the taxes were apportioned, which could not be determined except as set out according to the described ownership of each person owning a portion of any described tract. It appears clear that in county court drainage districts the statutes of this state provide that the benefits and damages to land or other property in the district must be assessed on the basis of tracts, and if a forty acre tract is owned, as such, all land in each forty acre tract and described as the property of any person, such person must bear his proportionate share of the tax levied against such tract, that is, if there are forty persons owning each an acre in said forty acre tract each would be liable for a one-fortieth of the tax assessed against the whole tract, and the various portions of land in such tract would be liable to pay that portion of the tax according to the amount or portion of land such person owns.

The provisions of the sections in Chapter 242, RSMo 1949, relating to drainage districts organized in the circuit court, and in Chapter 243, RSMo 1949, relating to such districts organized in the county court, are distinct and separate plans. The provisions in the various sections of said Chapter 242 relating to circuit court districts appear to be more complete and comprehensive in procedure in regard to the maintenance of such districts than the sections of the statute in Chapter 243 relating to county court drainage districts appear to be. In circuit court drainage districts Section 242.490 is applicable only to maintenance tax levied after the original assessment thereof has been paid and discharged, and that thereafter it is only desired and necessary to levy and collect such maintenance tax, the board of supervisors of such circuit court drainage district may, by resolution, provide that in the tax books containing the maintenance tax it shall be sufficient if the several governmental lots, forty acre tracts, or other subdivisions of land as they appear in the decree of the circuit

Honorable Leon McAnally

court organizing such districts, be accurately described, and described together, if contiguous, according to each ownership, and the name of the owners thereof as they may appear in the deed records may be used in such tax books of a circuit court drainage district.

In county court drainage districts organized and maintained under the terms of the section amended in Chapter 243, Section 243.350, Laws of Missouri 1953, supra, applies to both the annual installment and the maintenance taxes, if any, levied for each year. Such Section 243.350, as so amended, provides the exclusive procedure to be followed and entries to be made in making up the tax books of a county court drainage district as hereinabove set out in detail. Neither does that section nor any other section of said Chapter 243 have any provision or requirement permitting the consolidation together of separate tracts of land, even if contiguous, to permit such tracts to be described together. Said Section 243.350, as amended, provides that all lands in such county court drainage districts, in levying and assessment of installment taxes and maintenance taxes, if any, thereon must be described according to the separate ownership therein of each individual owning any portion, and what portion he owns, in such tract, whether it be a forty acre tract or other description of land. The section also provides that in making up the tax books of such county court drainage district the entries in the tax books shall show the amount of tax owing by any person on the land described as being owned by him. The statutes of this state would have to provide the authority to permit drainage districts organized by county courts to exercise the authority to proceed under the terms of said Section 242.490 with respect to describing tracts of land, together, if contiguous, or in any other respect, before it could be done, under the terms of said Section 242.490. No such authority has been prescribed by the General Assembly for drainage districts organized under county courts to so proceed.

CONCLUSION

Considering the premises, it is the opinion of this office that in making up the tax books of a drainage district organized in the county court of a county in Missouri, the entries in such tax books should be made therein by the county clerk

Honorable Leon McAnally

of such county as are directed in subsection 2 of Section 243.350, Laws of Missouri 1953, pages 538, 539, and as also set out in this opinion.

The foregoing opinion, which I hereby approve, was prepared by my assistant, George W. Crowley.

Very truly yours

John M. Dalton
Attorney General

GWC:lc

COUNTY COURTS: (1) The valuation of government-owned lands for purposes of apportioning moneys to school districts is to be made by the county court as is provided in the first sentence of Section 12.100 Cum. Supp. 1955. These lands are to be evaluated by the county court as if they were privately owned. (2) The amount of land to be assessed depends upon the particular district. As to any district entitled to apportionment of these moneys, the amount of land to be assessed shall be the amount that the district could have assessed but for the acquisitions of the land by the government. (3) Any district which would have had land to assess but for the acquisition of these lands by the government is entitled to apportionment. This includes any reorganized district which is now composed of any district or any part of any district that could have assessed the land but for the acquisition thereof.

March 1, 1956

Honorable Roy W. McGhee, Jr.
Assistant Prosecuting Attorney
Reynolds County
Centerville, Missouri



Dear Mr. McGhee:

This will acknowledge your request of recent date, in which you ask the following questions:

"I would appreciate an opinion from your office on the interpretation and implementation of the following statute, which seems to create quite an administrative and financial problem here.

"The problem is concerned with the distribution and allocation of so-called 'flood control monies'. The statute in question is Section 12.100, RSMo 1955, and the problem arises over the last sentence in that section, to-wit:

"'....The county court shall allow to the school districts and for roads an amount based upon their respective levies, equal to that which would ordinarily be allowed to them out of taxes from property owned by the United States if the property were privately owned before using any of such moneys for defraying other expenses of the county.'

"My questions are as follows:

"1. How and by whom is the valuation of said lands determined?

"2. What amount of land is to be so assessed and how is this amount to be determined?

Honorable Roy W. McGhee, Jr.

"3. What school districts are to receive the benefits, e.g., the districts which formerly included such lands, or, those districts as reorganized, or the districts now adjacent to the lands in question?

"The old assessments are practically impossible to use presently because of the irregularity of the boundaries of land taken by the federal government for this purpose (Clearwater Dam). The county court is fearful of exercising their responsibility under the above section because of the vagueness inherent in the above-quoted portion. I might add that the legislative intent is not quite clear to the writer.

"The problem is further complicated by the fact that, assuming only the lands actually leased each year by the Corps of Engineers are to be considered, the leases involved fluctuate each year, not only in value but in the amount of land leased.

"This problem is particularly pressing at the moment because of the necessity of preparing a budget for the current year, in which the proper distribution of these monies will play an important part. For this reason I would most deeply appreciate an opinion from your office on the matter at your earliest convenience."

The allocation and distribution of moneys under Section 12.100 Cum. Supp. 1955, pertain only to moneys derived from the United States under Section 12.070 RSMo 1949, and Section 12.080, Cum. Supp. 1955.

Section 12.070, RSMo 1949, provides:

"Sums received from United States shall be expended, how.--All sums of money heretofore received or that may hereafter be received from the United States under an act of congress, approved May 23, 1908, being an act providing for the payment to the states of twenty-five per cent of all money received from the national forest reserves in the states to be expended as the legislature may prescribe for the benefit of the public schools and public roads of the county or counties in

Honorable Roy W. McGhee, Jr.

which the forest reserve is situated, shall be expended as follows: Seventy-five per cent for the public schools and twenty-five per cent for roads in the counties in which national forests are situated. Such funds shall be used to aid in maintaining the schools and roads of those school districts that lie or may be situated partly or wholly within or adjacent to the national forest in such county. The distribution to each county from the proceeds received on account of a national forest within its boundaries shall be in proportion that the area of such national forest in such county bears to the total area of such forest in the state, as of June thirtieth of the fiscal year for which the money is or was received."

Section 12.080, Cum. Supp. 1955, reads as follows:

"County court shall direct expenditures.-- All sums of money heretofore received or that may hereafter be received from the United States, or any department thereof under an act of congress approved August 18, 1941, being an act providing for the payment to the several states of seventy-five per cent of all moneys received for leases of land situated in the various states to which the United States owns fee simple title under the Flood Control Act of May 15, 1928, as amended and supplemented, to be expended as the general assembly may prescribe for the benefit of the public schools and public roads of the county or counties in which such government land is situated, or for defraying any of the expenses of county government in such county or counties, including public obligations of levee and drainage districts for flood control and drainage improvements, or as provided by any acts of congress authorizing the distribution of income or revenue from such lands owned by the United States of America or any of its departments, bureaus or commissions or any agency of the United States of America, to states or counties or as provided by any amendments to said acts, shall be expended as the county court of the county entitled to receive such funds may direct in accordance with the provisions and regulations as have been or may be in the future provided by the acts of congress providing for such distribution to states and counties."

Section 12.100, Cum. Supp. 1955, reads in part as follows:

Honorable Roy W. McGhee, Jr.

"* * * The county court shall allow to the school districts and for roads an amount based upon their respective levies, equal to that which would ordinarily be allowed to them out of taxes from property owned by the United States if the property were privately owned before using any of such moneys for defraying other expenses of the county."

It is the opinion of this writer that the last sentence of Section 12.100, which is quoted above, pertains only to moneys received under Section 12.080, that is, money derived from leases, since Section 12.070 declares that 75% of the money received by the state under that Section (12.070) shall go for the benefit of schools and the other 25% shall go for the benefit of public roads. Thus, Section 12.070 provides where all of the moneys received under that section shall go. Section 12.080 has been amended and provides for moneys to go "for defraying any of the expenses of county government" as well as for the benefit of public schools and public roads of the county. Section 12.100, as amended, declares that before any of such moneys are used at the discretion of the county court for any of the purposes set out in Section 12.080, Cum. Supp. 1955, a certain amount shall go to certain school districts and for roads, to wit, an amount based upon the respective levies equal to that which would ordinarily be allowed to them out of taxes from property owned by the United States as if the property were privately owned.

The intention of congress under the Flood Control Act, providing for payment of 75% of the lease moneys to the state, was to return to the state some of the revenue of which it had deprived that state by acquiring the lands. The General Assembly of Missouri, then, in accordance with the intention of congress, amended Section 12.100, RSMo 1949, so that the school districts adversely affected by this deprivation of tax sources will be entitled to revenue in an amount which will equal the tax money, except for any variation in the levy, which they would be receiving but for the acquisition of these lands by the government.

The first sentence of Section 12.100, Cum. Supp. 1955, reads as follows:

"It shall be the duty of the county court of each county receiving any such moneys to use such funds to aid in maintaining the schools and roads and for defraying any of the expenses of the county in accordance with the provisions set forth in sections 12.070 and 12.080. * * *"

Thus it follows that the county court has the duty of making the valuation and distribution of moneys. It may request the assistance of the assessors but is given no power by the statute to compel such assistance.

Honorable Roy W. McGhee, Jr.

The amount of land to be assessed will depend upon the particular district. If the district is one whose boundaries have not been changed since the acquisition of the land by the government, then all the government-owned land within that district shall be assessed. "All government-owned land" in this instance would include inundated land if there be any.

Any district unaffected by the government's purchase of lands is not entitled by right to share in the apportionment under Section 12.100 Cum. Supp. 1955. That is to say, any district unaffected at the time of the purchase or also any reorganized district which includes any district or districts or any part thereof which were unaffected at the time of the purchase, is not entitled to share in the apportionment. On the other hand, any district reorganized since the acquisition of the lands by the government shall share in the apportionment to the extent that it would have received tax moneys but for the acquisition. For example, suppose that X district, a reorganized district, is composed of what was A, B and C districts and that they (A, B and C districts) were districts existing at the time of the acquisition of the lands by the government. Assuming further that, of the government-purchased lands, 100 acres is in what was A district, 200 acres in B district, and 300 acres in C district. Then X district will assess 600 acres and apply its particular levy to that assessment in order to determine what amount it will receive in the apportionment. Taking the same hypothetical, except let us assume that a part of what was originally C district is now a part of Y district, a reorganized district, and the remaining part of C district is in X district, the reorganized district, then the amount of lands that could be assessed by X and Y districts as to C district should be rateably apportioned. In other words, if one-half of what was originally C district is now in the reorganized district, X, and the other one-half of C district is in the reorganized district, Y, then both X and Y districts could assess 150 acres as to C district.

In summarizing the above conclusions, any district, whether it be one existing substantially as it did at the time of the acquisition of the lands by the government, or a reorganized one, shall assess the amount of land that would have been available for assessment but for the acquisition. If any of the said districts are not adversely affected in that none of its lands was purchased or none of the lands of the original districts making up the reorganized district was purchased, then these districts are not entitled by right to share in the apportionment. Any district entitled to share in the apportionment shall receive an amount based upon its particular levy on the assessment as above explained.

CONCLUSION

It is therefore the opinion of this office that:

Honorable Roy W. McGhee, Jr.

(1) The valuation of government-owned lands for purposes of apportioning moneys to school districts is to be made by the county court as is provided in the first sentence of Section 12.100 Cum. Supp. 1955. These lands are to be evaluated by the county court as if they were privately owned.

(2) The amount of land to be assessed depends upon the particular district. As to any district entitled by right to apportionment of these moneys, the amount of land to be assessed shall be the amount that the district could have assessed but for the acquisitions of the land by the government.

(3) Any district which would have had land to assess but for the acquisition of these lands by the government is entitled to apportionment. This includes any reorganized district which is now composed of any district or any part of any district that could have assessed the land but for the acquisition thereof.

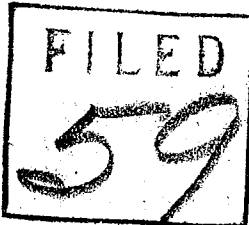
Yours very truly,

JOHN M. DALTON
Attorney General

HLH/b1

WAIVERS OF PRELIMINARY HEARINGS:
WAIVERS OF WRITTEN RECORD OF
WITNESSES' TESTIMONY:
WAIVER OF WITNESSES' SIGNATURES:

(1) A defendant may waive his right to a preliminary hearing under Sec. 544.250 RSMo 1949, and Supreme Court Rule 23.02 RSMo 1955, in any criminal proceeding.
(2) A defendant may waive the written record and signatures referred to in Sec. 544.370 RSMo 1949, and Supreme Court Rule 23.12 RSMo 1955.



March 19, 1956.

Honorable Roy W. McGhee, Jr.,
Prosecuting Attorney
Wayne County
Greenville, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"The local magistrate and myself would very much appreciate a speedy opinion on the following question:

"May a defendant in a homicide (or capital) case waive his preliminary hearing? (reference is made to Sec. 544.250, RSMo 1949, and Sup. Ct. Rule 23.02, RSMo 1955).

"Also:

"May a defendant waive the written record and signatures required by Sec. 544.370, RSMo 1949 and Sup. Ct. Rule 23.12, RSMo 1955?

"This problem has arisen in the past and has never been satisfactorily resolved. Further, we have a case currently pending here that is affected by this problem. Your prompt opinion would be most invaluable."

You ask, first, if a defendant may waive his right to a preliminary hearing in a homicide (or capital) case. The opinion of this office is that he may.

Section 544.250 RSMo 1949 is as follows:

Honorable Roy W. McGhee, Jr.

"No prosecuting or circuit attorney in this state shall file any information charging any person or persons with any felony, until such person or persons shall first have been accorded the right of a preliminary examination before some magistrate in the county where the offense is alleged to have been committed in accordance with this chapter. And if upon such hearing the magistrate shall determine that the alleged offense is bailable, such person or persons shall thereupon be admitted to bail conditioned for their appearance on the first day of the next regular term and from day to day and term to term thereafter, of the circuit court or the court having criminal jurisdiction in such county, to answer such charges as may be preferred against them, abide sentence and judgment therein, and not to depart said court without leave; provided, a preliminary examination shall in no case be required where same is waived by the person charged with the crime, or in any case where an information has been substituted for an indictment as authorized by section 545.300 RSMo 1949."

Supreme Court Rule 23.02 RSMo 1955, is as follows:

"No information charging the commission of a felony shall be filed against any person unless the accused shall first have been accorded the right of a preliminary examination before a magistrate in the county where the offense is alleged to have been committed. The accused may waive a preliminary examination after consultation, or after being accorded the right of consultation, with his counsel. A record entry of such waiver shall be made and the magistrate shall hold the accused to answer in the court having jurisdiction of the offense of which he stands accused. If the offense is bailable and the accused has not previously been admitted to bail, he shall be admitted to bail as provided in these Rules. No preliminary examination shall be required where an information has been substituted for an indictment."

There seems to be an unwavering line of authority in this state that a defendant may waive his right to a preliminary hearing. See *State v. Ferguson*, 278 Mo. 119, 212 S.W. 339, where the defendant was charged with first degree murder and convicted of second degree murder. The court said at l.c. 341:

Honorable Roy W. McGhee, Jr.

"* * * We have held affirmatively in a number of cases that a preliminary examination may be waived not only before the examining tribunal, but at the time the defendant is required to plead to the information in the trial court, and that if he pleads the general issue of not guilty, as was done here, he will be held to have waived such examination.* * *"

See also the case of State v. Thomas, 353 Mo. 345, 182 SW2d 534, where the defendant was charged with forcible rape. The evidence tends to show that the preliminary hearing was not held before the magistrate issuing the warrant. The court in affirming the conviction of the trial court assumed that the preliminary hearing before the magistrate was void, and that the waiver before this magistrate was therefore void. The court said:

"But that does not dispose of the whole matter. The appellant not only waived, or attempted to waive, preliminary examination before Justice Erickson. The record brought up from the circuit court further shows that after the prosecuting attorney filed his information, the appellant went to trial without objection, gambled on the verdict, and did not attempt to raise the point now urged until after his conviction, by a motion to dismiss the suit and a motion for new trial, both filed on March 9, 1943, twenty-seven days after the verdict. In the meantime present counsel had entered his appearance in the case on February 19 and obtained a further extension of time within which to file a motion for new trial. In these circumstances it is obvious that appellant cannot complain unless he can establish his contention that the failure to accord him a valid preliminary examination in a magistrate's court deprived the circuit court of jurisdiction over the subject matter of the criminal case; and that appellant could not waive that omission.

"We are constrained to hold against this contention. Present counsel raised it in this court en banc by habeas corpus and his view was rejected on May 4, 1943, less than a month after the motion had been overruled by the circuit court. Conceding the justice of the peace court had no jurisdiction, yet when appellant was brought into the circuit court, waived formal arraignment, entered a plea of not guilty, announced ready for trial, and went to (538) trial, he was before a tribunal which did have jurisdiction both of the subject matter and his person. The circuit court's

Honorable Roy W. McGhee, Jr.

jurisdiction was not derivative, as it would have been on an appeal from a justice of the peace court, the probate court or other lower court. Under the express provisions of Sec. 3891 it had exclusive original jurisdiction to hear and determine the case with the aid of a jury. The preliminary hearing before the justice of the peace was for a wholly different purpose. It was to determine whether a crime had been committed, and whether there was probable cause for charging the accused therewith. If that was found, it was the duty of the justice to bind him over for trial, either under recognizance, if the offense was bailable, or by committing him to jail.

"Now while it is true that Sec. 3893, supra, provides no prosecuting attorney shall file an information charging any person with a felony until such person shall first have been accorded the right of a preliminary examination, yet that does not mean the circuit court has no jurisdiction over the subject matter of the cause in the broad and commonly accepted sense. It rather means the court in those circumstances cannot exercise its jurisdiction; or, stated another way, the court conditionally lacks jurisdiction to try the particular case because of the prohibition in the statute, the condition being whether or not the defendant has waived preliminary examination - for the statute also contains the aforesaid proviso that such examination shall not be required if he does waive it.

" * * * * *

"Under a line of cases reaching back to the time when Sec. 3893 was first enacted in 1905, the defendant will waive not only defects in the proceedings but even the complete absence of a preliminary examination, by pleading the general issue and going to trial. This was recognized in the McCutchan case cited in the second preceding paragraph, where there had been no preliminary hearing at all, the opinion carefully pointing out that a preliminary examination had not been waived. The question had been duly presented there by plea in abatement. The same was true in the Nichols case, cited in the last paragraph. In the McKinley case a motion to quash the information was treated as a plea in abatement. The

Honorable Roy W. McGhee, Jr.

cases just cited in marginal note 5 further hold that the preliminary examination of itself is not a part of the trial of the accused, though it is conditionally an essential antecedent step in the procedure; and that the burden is on the accused to raise the point and make any necessary showing if he would avail himself of it. He may waive the examination either at the preliminary hearing or when called on to plead, but he (539) cannot do so after he has submitted himself to trial. Since Sec. 3893 expressly says he may waive it, he cannot complain on that ground after he has waived it. It is a matter of personal privilege with him."

Note that Sec. 3893, referred to by the court, is now Sec. 544.250 RSMo 1949.

The above cases, and others too numerous to cite, sustain the position that a defendant may waive his right to a preliminary hearing in a homicide (or capital) case.

Supreme Court Rule 23.02 RSMo 1955, is similar to Sec. 544.250 RSMo 1949, except that the Supreme Court Rule provides that a record entry of such waiver shall be made. This would not seem to change the decisions of the cases deciding that a preliminary hearing may be waived. This provision is only concerned with an entry after a waiver has been made; it has no bearing on whether or not a defendant may waive his right to a preliminary hearing.

Secondly, you ask whether or not a defendant may waive the written record and signatures required by Sec. 544.370 RSMo 1949, and Supreme Court Rule 23.12 RSMo 1955.

Section 544.370 RSMo 1949, is as follows:

"In all cases of homicide, but in no other, the evidence given by the several witnesses shall be reduced to writing by the magistrate, or under his direction, and shall be signed by the witnesses respectively."

Supreme Court Rule 23.12 RSMo 1955, is as follows:

"In all cases of homicide, the evidence given by the witnesses shall be reduced to writing by the magistrate, or under his direction, and shall be signed by the witnesses respectively."

Honorable Roy W. McGhee, Jr.

It is the opinion of this office that a defendant may waive the written record and signatures as required by the above statutes.

There seems to be no conflict in the cases decided by the courts of Missouri on this question. See the case of State v. Lloyd, 337 Mo. 990, 87 SW(2) 418, where defendant had appealed from the conviction of second degree murder. Though the judgment of the trial court was reversed on other grounds, as to the issue concerning waivers, the court had this to say:

" * * * * *

"From the justice's transcript of the preliminary hearing, it appears that the affidavit for a state warrant charged appellant and his companions, McDaniel and Boston, with the offense. During the course of the preliminary hearing, the state dismissed the charges as to McDaniel and Boston; and, according to the evidence adduced in connection with the offer of the transcript, at the close of the preliminary hearing, after some discussion, as some of the witnesses lived outside the state, it was agreed that the signatures of both the state's and appellant's witnesses were waived by the state and the appellant. Section 3480, R.S. 1929, Mo. St. Ann., § 3480, p. 3115, provides, 'In all cases of homicide, but in no other, the evidence given by the several witnesses shall be reduced to writing by the magistrate, or under his direction, and shall be signed by the witnesses respectively.' The transcript of the testimony of witnesses Grimmett and Lindsay was not signed. If the signatures were not waived, the transcripts were inadmissible. * * * However, we have repeatedly held a defendant may waive his statutory rights. For instance, he may waive his right to a preliminary hearing [State v. Miller, 331 Mo. 675, 678(1), 56 S.W.(2d) 92, 94(1); State v. Ferguson, 278 Mo. 119, 129(2), 212 S.W. 339, 341(3), * * *] where a plea of not guilty in a murder case was held to waive the requirements that the evidence at the preliminary hearing be reduced to writing, signed by the witnesses certified by the magistrate, and delivered to the clerk of the court having cognizance of the offense; or his constitutional right, Mo. Const. art. 2, § 22, 'to meet the witnesses against him face to face.' State v. Wagner, 78 Mo. 644, 648, 47 Am. Rep. 131, holding, where accused insisted on trial upon the state seeking a continuance on account of the absence of witnesses, his consent to the reading of a written statement of the absent witnesses to the jury waived this constitutional right, State v. Williford, 111 Mo. App. 668, 671, 86 S.W. 570, 572, and cases infra.

Honorable Roy W. McGhee

The signing of the transcript of his testimony by a witness is but an incident to the preliminary hearing. The signature or lack of one does not go to the merits of the preliminary or the trial, or affect the truth of the testimony thus adduced. Undoubtedly, appellant and the state had the right to waive this statutory provision.* * *

Section 3480 RSMo 1929, referred to in the above case, and Section 3870 RSMo 1939, are exactly the same as Section 544.370 RSMo 1949.

See also the case of State v. Ferguson (cited by the court in State v. Lloyd), supra, wherein the court said:

"It is urged that the information filed by the prosecuting attorney conferred no jurisdiction on the trial court because the testimony taken at the preliminary examination was not reduced to writing, signed by the witnesses, certified by the magistrate taking same, and by him delivered to the clerk of the court having cognizance of the offense, as required by sections 5033, 5042, R.S. 1909. The contention as to the absence of jurisdiction is not tenable. The criminal court of Greene County is clothed with exclusive original jurisdiction of all criminal cases in said county (section 4200, R.S. 1909). Thus panoplied, the consideration by it of an information filed therein by the prosecuting attorney is within the limits of its general jurisdiction, and not such a special or exceptional exercise of same as to require that all of the preliminary steps leading up to such filing be shown on the face of the information. We have held affirmatively in a number of cases that a preliminary examination may be waived not only before the examining tribunal, but at the time the defendant is required to plead to the information in the trial court, and that if he pleads the general issue of not guilty, as was done here, he will be held to have waived such examination.
* * *

No cases have been found which would indicate that the courts have taken or will take an opposite view from that expressed in the cases cited. From the authority of the cases cited there seems to be sufficient reason to hold that a defendant may waive the requirements of Section 544.370 RSMo 1949, and Supreme Court Rule 23.12 RSMo 1955.

Honorable Roy W. McGhee, Jr.

CONCLUSION

It is therefore the opinion of this office that: (1) a defendant may waive his right to a preliminary hearing under Section 544.250 RSMo 1949, and Supreme Court Rule 23.02 RSMo 1955, in any criminal proceeding; (2) a defendant may waive the written record of a witness's testimony and the signature of the witness thereto as required in Section 544.370 RSMo 1949, and Supreme Court Rule 23.12 RSMo 1955.

Very truly yours,

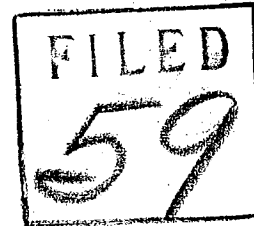
John M. Dalton
Attorney General

HLH/lc

SCHOOLS: In the event the assessed valuation of real
SCHOOL DISTRICTS: or personal property is increased by the
TAXES: action of the assessor by ten per cent or
more over the prior year's valuation and
such increase is permitted to stand by the
action of the county board of equalization and the State Tax
Commission, it is the duty of the various school boards of the
county to adjust the tax rates in accordance with and by vir-
tue of the provisions of Section 137.073, RSMo Cum.Supp. 1955.

September 20, 1956

Honorable Roy W. McGhee, Jr.
Assistant Prosecuting Attorney
Reynolds County
Centerville, Missouri



Dear Mr. McGhee:

Reference is made to your request for an official opinion
of this office, which request reads as follows:

"The school boards in Reynolds County set
their levies in April. The increase in
assessed valuation in Reynolds County was
made by the County Assessor. This assess-
ment was, of course, based on ownership
and valuations as of January 1, 1956. How-
ever, the assessor's books were not turned
over to the County Clerk until sometime in
June. Under these facts, must the school
boards make new levies by virtue of the
above statute? * * *"

Section 137.073, RSMo Cum.Supp. 1955, to which you refer,
provides as follows:

"Whenever the assessed valuation of real
or personal property within the county
has been increased by ten per cent or more
over the prior year's valuation, either by
an order of the state tax commission or by
other action, and such increase is made
after the rate of levy has been determined
and levied by the county court, city council,
school board, township board or other bodies
legally authorized to make levies, and cer-
tified to the county clerk, then such taxing
authorities shall immediately revise and lower
the rates of levy to the extent necessary to

Honorable Roy W. McGhee, Jr.

produce from all taxable property substantially the same amount of taxes as previously estimated to be produced by the original levy. Where the taxing authority is a school district it shall only be required hereby to revise and lower the rates of levy to the extent necessary to produce from all taxable property substantially the same amount of taxes as previously estimated to be produced by the original levy, plus such additional amounts as may be necessary approximately to offset said district's reduction in the apportionment of state school moneys due to its increased valuation. The lower rate of levy shall then be recertified to the county clerk and extended upon the tax books for the current year. The term 'rate of levy' as used herein shall include not only those rates the taxing authorities shall be authorized to levy without a vote, but also those rates which have been or may be authorized by elections for additional or special purposes. No levy for public schools or libraries shall be reduced below a point that would entitle them to participate in state funds."

School boards are specifically included in this section which provides that such boards shall revise and lower the rates of levy (subject to the limitations therein contained) to the extent necessary to produce substantially the same amount of taxes as previously estimated to be produced by the original levy where the assessed valuation of real or personal property within the county has been increased by ten per cent or more over the prior year's valuation and such increase is made after the rate of levy has been determined. It should be further noted that said action comes into operation where the increase is a result of an order of the State Tax Commission "or by other action."

You state that in the instant situation the increase (which we assume amounts to ten per cent or more over the prior year's valuation) was a result of the action of the assessor.

The school rates are required to be fixed in May of each year, Section 165.077, RSMo 1949. (The assessor is required to make up the tax books between the first day of January and the first day

Honorable Roy W. McGhee, Jr.

of June of each year, Section 137.115, RSMo Cum.Supp. 1955, and Section 137.245, RSMo 1949.) Thereafter, the property valuations are subject to the action of the State Tax Commission which meets June 20 of each year and the county boards of equalization which meet on the second Monday of July. The aggregate assessed valuation does not become final until it has received the attention of these two bodies. It clearly appears that such event does not occur until well after the time when the rates for school purposes have been fixed by the various school boards. Under such circumstances, we are of the opinion that an increase of the assessed valuation of real or personal property by ten per cent or more over the prior year's valuation effected by the action of the assessor, which increase is subsequently approved by the action of the State Tax Commission and the county board of equalization, would bring into operation the provisions of Section 137.073, supra, under which a school board would be required to adjust its tax rate.

CONCLUSION.

It is the opinion of this office that in the event the assessed valuation of real or personal property is increased by the action of the assessor by ten per cent or more over the prior year's valuation and such increase is permitted to stand by the action of the county board of equalization and the State Tax Commission, it is the duty of the various school boards of the county to adjust their tax rates in accordance with and by virtue of the provisions of Section 137.073, RSMo Cum.Supp. 1955.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Donal D. Guffey.

Yours very truly,

John M. Dalton
Attorney General

DDG:hw;sa

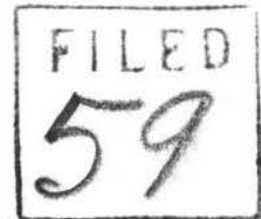
TAXATION:
PUBLIC PROPERTY:
TAXATION OF PROPERTY HELD
BY CHARITABLE CORPORATION:
LIABILITY OF TENANTS IN
COMMON FOR TAXES:

Persons owning realty on January 1 of each year are liable personally for the tax thereon for the following tax year. Land against which taxes are levied and assessed while under private ownership becomes immune from proceedings to enforce the tax lien and collect those taxes when title to said land is transferred to the State

of Missouri. A cotenant is liable only for the taxes on his individual undivided interest and not for taxes due on undivided interests of fellow cotenants.

November 20, 1956

Honorable Roy W. McGhee, Jr.
Assistant Prosecuting Attorney
Reynolds County
Centerville, Missouri



Dear Mr. McGhee:

This is in answer to your opinion request of September 21, 1956, reading as follows:

"On December 27, 1954 an undivided one-half interest in certain lands in Reynolds County were conveyed, by warranty deed, by Joseph and Marie Desloge, his wife, to The Desloge Foundation, a Missouri corporation, as shown in Book 113 at page 30 of the land records of Reynolds County.

"On January 5, 1955 the remaining undivided one-half interest in the same lands was conveyed by the said grantor to the said grantee as shown in Book 113 at page 45 of the land records of Reynolds County.

"On August 24, 1955 the above lands were deeded by The Desloge Foundation to the State of Missouri for the use and benefit of the Missouri State Park Board, as shown in Book 113 at pages 199 and 200 of the land records of Reynolds County.

"This property is now known as the Johnson Shut-ins and is under the authority and jurisdiction of the State Park Board at the present time.

"As of July 9, 1956, taxes for the year 1955 were due on the above property in the amount of \$231.05. Who is liable for payment of these taxes?"

Honorable Roy W. McGhee, Jr.

Section 137.075, RSMo 1949, provides that:

"Every person owning or holding real property or tangible personal property on the first day of January including all such property purchased on that day, shall be liable for taxes thereon during the same calendar year."

Under this section, the realty tax is not dependent upon continued ownership during the tax year but only upon ownership on the assessment date as shown in the statute, which is January 1st. (Collector of Revenue within and for the City of St. Louis, Missouri, v. Ford Motor Company, C.C.A., 158 F. 2d 354). Your letter of September 21st, addressed to this office, states that on January 1, 1955, the land in question was owned in cotenancy in undivided one-half interests by Joseph and Marie Desloge, husband and wife, as tenants by the entirety to one undivided half interest and by the Desloge Foundation, a charitable corporation. There is no doubt that the undivided one-half interest owned by Joseph and Marie Desloge on January 1, 1955, is subject to taxation and for which taxes they are personally liable. In the case of *In re Life Ass'n. of America*, 12 Mo. App. 40, it was held that taxation was personally against the owner of the property, whether the property be real or personal, and real property taxes are not merely a charge in rem against the land.

As to the undivided one-half interest owned by the Desloge Foundation, the constitutional provision and the legislative enactment, which provides for the exemption from taxation of certain real and personal property owned by a charitable corporation, must be considered to determine their applicability to the property owned by the Desloge Foundation. If the requirements of the Constitution and the statutory provision are met, then that interest held by the Desloge Foundation is exempt from taxation. If the requirements are not met, then the undivided one-half interest owned by the Desloge Foundation is also subject to taxation.

Article X, Section 6 of the 1945 Missouri Constitution provides as follows:

"All property, real and personal, of the state, counties and other political subdivisions, and nonprofit cemeteries, shall

Honorable Roy W. McGhee, Jr.

be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."

Section 137.100, RSMo 1949, provides also as follows:

"The following subjects shall be exempt from taxation for state, county or local purposes:

* * * * *

(6) All property, real and personal actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable, and not held for private or corporate profit shall be exempted from taxation for state, city, county, school, and local purposes; provided, however, that the exemption herein granted shall not include real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom be used wholly for religious, educational or charitable purposes."

These provisions, as construed by the Missouri Supreme Court en banc in the case of St. Louis Council of Boy Scouts of America v. Burgess, 240 S.W. 2d 684, 1951, require that there must be a showing of a present, actual, regular, and exclusive user of all the property owned by the charity for purposes purely charitable before the property is exempt from taxation and that mere prospective user for purposes purely charitable is not sufficient to exempt the property from taxation.

Honorable Roy W. McGhee, Jr.

In your letter to this office dated October 9, 1956, you state that on January 1, 1955, the property in question was not being used or held for any particular purpose. Since, on this date, there was no present, actual, regular and exclusive user of the property owned by the Desloge Foundation for purposes purely charitable as required by the above cited provisions for the exemption of charitable property from taxation, this office is of the opinion that the undivided one-half interest in the property owned by the Desloge Foundation is not exempt from taxation for the year 1955. Even though there was on January 1, 1955, a possibility that sometime during the tax year the property owned by the Desloge Foundation would be used for purposes purely charitable, this is not sufficient to warrant the exemption of the interest owned by the Desloge Foundation from taxation for the year 1955.

Now that we have concluded that the entire property is subject to taxation for the year 1955 and that the owners thereof on January 1, 1955, Joseph and Marie Desloge and the Desloge Foundation, are personally liable for the taxes thereon, we will now determine by what method the tax can be collected and the extent of the liability of the cotenants for the taxes due on the property for 1955.

There are two methods under Missouri law by which taxes against realty may be collected. The first is by sale of the land and the second, by distraint of the personality of the taxpayer owing the tax on the realty. (Collector of Revenue within and for the City of St. Louis, *Missouri v. Ford Motor Co.*, supra; *State ex rel. McKee v. Clements*, 219 S.W. 900, 281 Mo. 195.) In Missouri, there is no authorization for a personal judgment against a person for taxes on real property. (Section 140.640, RSMo 1949.)

Under the first method, the lien, which the state has against the specific piece of property for taxes, is enforced and the land can be sold at a tax sale and the proceeds used to satisfy the taxes due thereon. Under the second method, the collector is given the power to seize and sell personal property, without judgment, for the payment of all taxes. (*State ex rel. Hayes v. Snyder*, 41 S.W. 216, 139 Mo. 549.)

The provision for enforcing the tax lien on the land is Section 137.085, RSMo 1949:

Honorable Roy W. McGhee, Jr.

"2. Real property shall in all cases be liable for the taxes thereon, and a lien is hereby vested in favor of the state on all real property for all taxes thereon, which lien shall accrue and become a fixed encumbrance as soon as the amount of the taxes is determined by assessment and levy, and said lien shall be enforced as provided by law; said lien shall continue to be enforced until all taxes, forfeitures, back taxes and costs shall be fully paid or the land sold released as provided by law."

It is impossible to proceed against the land for taxes in this case because the title to the land on which the taxes are owed is now vested in the Missouri State Park Board, which means that the property is owned by the State of Missouri. Article X, Section 6 of the 1945 Missouri Constitution, provides in part that:

"All property, real and personal, of the state, counties and other political subdivisions, and nonprofit cemeteries, shall be exempt from taxation; * * *."

This provision of the Constitution has not only been construed to mean that all property owned by the bodies named therein is exempt from further taxation, but in *State ex rel. City of St. Louis v. Baumann*, 153 S.W. 2d 31, 1941, the Supreme Court of Missouri, en banc, held that any taxes levied and assessed against the land during the years prior to the acquisition of the title thereto by the exempted body cannot be collected after said land has been acquired by the exempt body by a proceeding against the land. It was also held in the same case that the exempt body which had acquired the land did not have to pay the back taxes in order to obtain a clear and unencumbered title to the property. The court, in so holding, stated at page 34 that:

"Even though taxes have been levied and assessed against a tract of land while under private ownership, if it be afterwards acquired by a governmental agency such taxes may not be collected. * * * Since the city is seeking to purchase the land in its public governmental capacity and not as a mere fiduciary, the land becomes immune from taxation as soon as the

Honorable Roy W. McGhee, Jr.

City becomes the owner of it and such immunity would extend to taxes previously assessed and levied."

Since the land cannot be proceeded against for the payment of the taxes owed by Joseph and Marie Desloge and the Desloge Foundation on the property for 1955, we must look to the other method for the collection of a real estate tax. This method calls for the distraint of personalty by the collector and as authorized by Section 139.120, RSMo 1949:

"1. The collector shall diligently endeavor and use all lawful means to collect all taxes which they are required to collect in their respective counties, and to that end they shall have the power to seize and sell the goods and chattels of the person liable for taxes, in the same manner as goods and chattels are or may be required to be seized and sold under execution issued on judgments at law, and no property whatever shall be exempt from seizure and sale for taxes due on lands or personal property; provided, that no such seizure or sale for taxes shall be made until after the first day of October of each year, and the collector shall not receive a credit for delinquent taxes until he shall have made affidavit that he has been unable to find any personal property out of which to make the taxes in each case so returned delinquent; but no such seizure and sale of goods shall be made until the collector has made demand for the payment of the tax, either in person or by deputy, to the party liable to pay the same, or by leaving a written or printed notice at his place of abode for that purpose, with some member of the family over fifteen years of age.

"2. Such seizure may be made at any time after the first day of October, and before said taxes become delinquent, or after they become delinquent; * * *."

In the situation involved here, the personal property of Joseph and Marie Desloge, husband and wife, and of the Desloge Foundation are subject to being proceeded against pursuant to

Honorable Roy W. McGhee, Jr.

Section 139.120, as set out above, and their personalty can be distrained and sold up to the amount necessary to pay the taxes due on the property for 1955 (Stein V. Bostran, C.C.A., 133 F. 2d 586; State ex rel. Hibbs v. McGee, 44 S.W. 2d 36, 328 Mo. 176). In proceeding against the personalty of the owners of the property, it must be remembered that the said personalty cannot be seized without a demand for payment being first made upon the persons liable. The demand must be made as prescribed by the above statute and a demand by mail is in effect no demand. (National Lumber and Creosoting Co. v. Burrows, 284 S.W. 153.) If a demand is not made as prescribed by statute, then the personalty cannot be seized until a written notice of demand for payment has been given in person to the parties liable, or a copy left with their families or agents at their places of residence (State ex rel. Rosenblatt v. Sargent, 12 Mo. App. 228).

As to the amount of the taxes that each of the cotenants are liable for and the amount of personalty of each that can be seized and sold for payment thereof, Section 139.090, RSMo 1949, provides in part as follows:

"2. The collector shall receive taxes on part of any lot, piece or parcel of land charged with taxes; * * *

"3. If payment is made on an undivided share of real estate, the collector shall enter on his record the name of the owner of such share, so as to designate upon whose undivided share the tax has been paid."

In Horstmeyer v. Connor, 56 Mo. App. 115, this statute was construed as allowing a person to pay the taxes due on his undivided interest in the property and his undivided interest would thereafter be exempt from sale for taxes due on the whole of the property. If the owners of the other undivided interests should thereafter fail to pay the taxes due on their interests, the undivided interest on which the taxes had been paid and the person owning that interest would not be liable for the taxes due on the other undivided shares.

For determining how much tax the owner of an undivided interest owes, Section 139.080, RSMo 1949, provides in part as follows:

"3. Any person desiring to pay on an undivided interest in any real property

Honorable Roy W. McGhee, Jr.

may do so by paying to the county collector a sum equal to such proportion of the entire taxes charged on the entire tract as interest paid on bears to the whole."

Since Joseph and Marie Desloge owned an undivided one-half of the whole property on January 1, 1955, they would be liable for one-half the total tax. The Desloge Foundation or the owner of the other undivided one-half would be liable for the other one-half of the total tax. The personal property of each could be seized and sold in an amount up to one-half of the total tax should either party refuse upon demand to pay their share of the taxes due.

CONCLUSION

It is the opinion of this office that on January 1, 1955, Joseph and Marie Desloge, husband and wife, and the Desloge Foundation, a charitable corporation, owned the property in question in undivided one-half shares as tenants in common. As the owners thereof on that date, they are held personally liable for the tax on that property for the tax year 1955. The undivided one-half interest owned by the Desloge Foundation is not exempt from taxation because the land was not being used for charitable purposes on January 1, 1955, and mere prospective user for charitable purposes during the tax year, 1955, is not enough to exempt the property from taxation during 1955.

It is also the opinion of this office that the land cannot be proceeded against since the title thereto is now vested in the State of Missouri and the land is thereby immune from both past, present and future taxation. However, the personalty of the tenants in common who owned the property on January 1, 1955 can be seized and sold by the collector to pay the 1955 taxes on the land, after demand or notice for payment has been made, pursuant to authority vested in the collector by Section 139.120, RSMo 1949.

The cotenants, Joseph and Marie Desloge and the Desloge Foundation, are liable only for the taxes on their undivided one-half interests in the property and their individual personalty can be seized and sold, after notice and demand for

Honorable Roy W. McGhee, Jr.

payment, up to an amount equal to one-half the total tax due. As cotenants, they are not liable for the taxes due on the other undivided interests but only for taxes due on their own undivided interest.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard W. Dahms.

Very truly yours,

John M. Dalton
Attorney General

RWD:bl:hw

SCHOOLS: A regulation passed by a school board stating that no child could enter the first grade unless he became six years of age prior to September 15th is not a denial of his legal right and is not unreasonable.



May 4, 1956

Honorable Charles W. Medley
Prosecuting Attorney
St. Francois County
Farmington, Missouri

Dear Sir:

The fact situation upon which you desire an official opinion is set forth in the letter from Mr. Bell to Mr. Hardy sent by you to us. That letter reads:

"The Board of Education of R-VII passed a regulation a year ago which stated that no child could enter the first grade unless he became 6 years of age prior to November 15. It is the intention this year to move that to September 15. There has arisen some question as to the legality of such a regulation."

Section 163.010, RSMo, Cum. Supp. 1955, reads, in part, as follows:

"The board of directors or board of education shall have power to make all needful rules and regulations for the organization, grading and government in their school district--said rules to take effect when a copy of the same duly signed by order of the board, is deposited with the district clerk, whose duty it shall be to transmit forthwith a copy of the same to the teachers employed in the schools; said rules may be amended or repealed in like manner. * * *"

This is indeed a broad grant of power and vests in the school boards a considerable amount of discretion in the operation of schools. In the case of State v. Robinson (Springfield Court of Appeals), 276 SW2d 235, at l.c. 240, the court stated:

Honorable Charles W. Medley

"Our courts have frequently announced and heartily approved the salutary and time-honored principle that school laws will be construed liberally to aid in effectuating their beneficent purpose, and that, since the administration of school matters usually rests in the hands of plain, honest and well-meaning citizens, not learned in the law, substantial rather than technical compliance with statutory provisions and requirements will suffice. State ex rel. Acom v. Hamlet, 363 Mo. 239, 250 S.W. 2d 495, 498(4); State ex rel. School Dist. No. 34, Lincoln County v. Begeman, supra, 2 S.W. 2d loc. cit. 111(3); School Dists. Nos. 18, 19, 29, 30, Webster County v. Yates, supra, 142 S.W. loc. cit. 794; School Dist. No. 58 of Pike County v. Chappel, supra, 135 S.W. loc. cit. 79; State ex rel. School Dist. No. 18 v. Sexton, supra, 132 S.W. loc. cit. 13. * * *"

However, such discretion is not without limitation, and the question here is whether or not the action contemplated is within such limitation.

We here note Section 164.010, RSMo 1949, which requires parents to send to school their normal children who are between the ages of seven and fourteen. Thus we see that parents cannot be compelled to send a child to school until it is seven years old. This, of course, does not necessarily mean that a school board can deny a child who is under seven admission to the school.

We here note Section 163.160, RSMo 1949, which reads:

"The board of directors or board of education of any school district in this state may provide for the gratuitous education of persons between five and six and over twenty years of age, resident in such school district. Such gratuitous education, however, shall be provided only out of revenues derived by such school district from sources other than those described in section 3, article IX of the constitution of this state, and only with so much of such revenues as are not required for the establishing and maintaining of free public schools in such school districts for

Honorable Charles W. Medley

the gratuitous instruction of persons between the ages of six and twenty years; provided, that nothing in this section shall be construed as affecting the basis of apportionment of the public school fund of this state as now fixed by law."

Whether a school board will provide such schooling as is discussed above for persons between the ages of five and six and over twenty is clearly discretionary. The statement "for the gratuitous instruction of persons between the ages of six and twenty years" does indicate that the law intends that children who are six years of age shall be eligible for school attendance.

We also note Section 164.030, RSMo, Cum. Supp. 1955, which reads, in part:

"1. The board of directors of each district shall, between the thirtieth day of April and the fifteenth day of May of each year take, or cause to be taken, and forwarded to the county superintendent of schools an enumeration of the names of all persons over six and under twenty years of age resident within the district, designating male and female, white and colored, and age of each, together with the full name of the parent or guardian of each child enumerated; and also an enumeration of all blind and deaf and dumb persons of school age resident within the school district, designating male and female, white and colored, and age of each, together with the full name of the parent or guardian of each child so enumerated, and their post office address, which said enumeration shall be subscribed and sworn to; and any parent or guardian who shall knowingly furnish any enumerator the name of any child who is under six or over twenty years of age, or who is a nonresident of the district, shall be guilty of a misdemeanor and any enumerator who shall knowingly return a false enumeration shall be guilty of a misdemeanor and punishable by fine, not to exceed one hundred dollars; * * *."

Honorable Charles W. Medley

There is nothing in this section which could be said to make mandatory upon school boards the admission of children who are six years of age.

We here note that Section 1 of Article XI of the 1875 Missouri Constitution read as follows:

"A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the General Assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state between the ages of six and twenty years."

This clearly gave children who were six years of age the right to attend school. However, the 1945 Missouri Constitution, in Section 1(a) of Article IX, which section takes the place of the former section, reads:

"A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law. Separate schools shall be provided for white and colored children, except in cases otherwise provided for by law."

This, it will be noted, puts a maximum age upon school attendance but not a minimum.

Thus, it appears that neither the Missouri Constitution nor the statutes have attempted to define exactly the age at which a child might attend school as a matter of right. In the absence of such constitutional or statutory provision, we must conclude that the matter has been left in the hands of the school district directors under Section 163.010, supra.

In regard to this, we direct attention to Section 2, Volume 56, C.J., page 807, which reads:

"The right or privilege to attend the public schools is derived from either the constitution or statute, and, in the absence of constitutional restrictions, is subject to such regulations, in respect to the admission and classification of pupils, as the legislature may from time to time see fit to make. Except in so far as expressly regulated by statute, the board or officers having control and supervision of the admission of pupils as a general rule have a discretionary power to establish reasonable rules and regulations for their admission, such as rules and regulations making a classification of pupils according to sex, or by which the assignment of children between schools affording equal advantages shall be determined, or requiring pupils to apply to such board or officers for orders for admission, or requiring graduates of parochial schools to take an examination for admission to the high school while admitting graduates of public schools without examination; and the exercise of such discretionary power will not be interfered with by the courts, except in cases of manifest abuse. Such rules and regulations, however, must be reasonable, otherwise they cannot be enforced. Thus a rule or regulation has been held unreasonable which excludes a pupil from admission for the purpose of taking other studies because of his failure to pass a satisfactory examination in one study, or which excludes him from admission entirely because he is married, or which imposes a matriculation charge as a condition to admission, or which prohibits children who have just arrived at a school age from entering the schools at any time except during the first month of the fall or spring terms. On the other hand a rule or regulation has been held proper which excludes children under the age of seven years unless they enter at the beginning of the fall term, or within four weeks thereafter, or unless they are qualified to enter classes existing at the time of their

Honorable Charles W. Medley

entry, or which excludes children temporarily from a school for want of room, notwithstanding there is a statutory provision making attendance at school for a certain number of weeks in the year compulsory."

In the absence of any statutory regulation on the question, we believe that a rule by a school board that a child is eligible for enrollment in the public schools only if he shall have attained the age of six years prior to September 15 could not be said to be an unreasonable exercise of the authority conferred upon the board of directors and would be valid.

CONCLUSION

Therefore, it is the opinion of this office that a board of education may by regulation provide that a child cannot be enrolled in the first grade unless he shall have attained the age of six years prior to September 15.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

Yours very truly,

JOHN M. DALTON
Attorney General

(HPW:sm)
RRW:ml

SCHOOLS: Statutory common school district meeting may adjourn promptly
ELECTIONS: upon completion of official business.



June 14, 1956

Honorable Harry J. Mitchell
Prosecuting Attorney
Marion County
Palmyra, Missouri

Dear Mr. Mitchell:

This office is in receipt of a request from you for an opinion as follows:

"The Annual Meeting of a Common School District held on the first Tuesday in April, 1956, at the District School House, is required by Section 165.200 Mo.R.S. 1949, to commence at 2:00 o'clock p.m. If the voting is for directors of the School District, and approximately one-third (1/3) of the qualified voters of the district are employed, working for a wage or salary, and are required to be at work until 5:00 o'clock p.m., is it required by law that the School meeting be held open until 5:00 o'clock p.m.? Is the meeting required to be held open any particular length of time?

"If a person arrives at the meeting at 2:30 p.m. the voting for director has been closed, and the votes counted, is the person unlawfully deprived of his vote if not permitted to vote?"

An examination of statutory provisions concerning the election of directors of a common school district discloses that the cardinal provisions for the organization of such a district are contained in Sections 165.163, 165.200, 165.203, 165.207 and 165.213, RSMo 1949. It will be noted that 165.200, above mentioned, provides for annual meetings of common school districts as follows:

"The annual meeting of each school district shall be held on the first Tuesday in April

Honorable Harry J. Mitchell

of each year, at the district schoolhouse, commencing at two o'clock p.m. If no schoolhouse is located within the district, the place of meeting shall be designated by notices, posted in five public places within the district fifteen days previous to such annual meeting, or by notice for same length of time in all the newspapers published in the district, giving the time, place and purposes of such meeting."

And that Section 165.203 provides for the assembly of the voters in the annual meeting and outlines the procedure for the organization of the meeting and the authority vested in the qualified voters, assembled at the annual meeting. There is a provision in Section 165.203 for choice by ballot of one director to hold office for the term of three years and a further provision for the determination of the length of the school year by ballot.

Balloting is further mentioned in subdivision 9 wherein it is provided the voters are empowered to designate by ballot their choice for a person to fill the office of county superintendent of schools. This balloting is mentioned to show the procedure for the conduct of the common school district meeting that is directed by statute. There is, as shown above, a direction in the statute as to when the meeting will convene; nothing is mentioned concerning the time of continuation of the meeting or the adjournment of the meeting.

In regard to the character of the organization of a common school district, our court said in the case of Tate vs. School District No. 11 of Gentry County, 324 Mo. 477, 23 S.W.(2d) 1013, at p. 120:

"* * * * While provision is made in the statutes for a change in the personnel of the membership of the board of directors by the vote of the qualified electors of the school district at each annual meeting of the school district, yet the intention of the Legislature is clearly reflected in the statutes that the board of directors of a common school district is a continuous body or entity, and that transactions had, and contracts made, with the board, are the transactions and contracts of the board, as a continuous legal entity, and not of its individual members."

Honorable Harry J. Mitchell

The reference made in the above to the annual meeting and to the change to be made in the personnel in the board of directors by vote will be noted.

In State ex rel. Wagster vs. School District No. 4-C, 358 Mo. 839, 217 S.W.(2d) 500, the court considered a situation where two persons arrived late to a common school district meeting when the ballots had been cast and the voting had been declared closed by the chairman. The court, in regard to that situation, said, at l.c. 502, as follows:

"Even though the section is directory, the Donicas were not wrongfully deprived of their right to vote because they were not present until after all present had voted and the tellers had called the vote, although the result of the balloting had not been announced. In other words, the statute was followed. Directory provisions of a law are not intended by the legislature to be disregarded. 50 Am. Jur. 43.

"If the chairman had reopened the voting and permitted the Donicas to vote, then we would have a different question before us. Under such circumstances we would have the question of whether such irregularity would be sufficient to invalidate the election where the statute is directory."

It is thought that it surely is indicated by the interpretation of the court and the mandate of the statute that the proper interpretation of the law is that a common school district is to be organized in a public meeting of the qualified voters of the district. The meeting, in accordance with the directions of the statute, is to be held on the designated date of the first Tuesday of April, at 2:00 o'clock p.m. It is felt that the hour of convening, as described in the statute, gives the hour of the commencement of the meeting and that there is then no time limit thereafter for the continuation of the meeting.

CONCLUSION

It is, therefore the opinion of this office that a common school district meeting, in accordance with Section 165.200, RSMo 1949, must

Honorable Harry J. Mitchell

meet at 2:00 o'clock p.m. and may close promptly upon the completion of the business required of it.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. James W. Faris.

Yours very truly,

John M. Dalton
Attorney General

JWF:bi/mw

ELECTIONS:
WRITE-IN AT PRIMARY:
WHEN POLITICAL COUNTY
COMMITTEE CAN FILL
VACANCY:

Names of persons written in on primary ballot should not be placed on ballot at official election; that Section 120.550, Mo. Cum. Supp. 1955, authorizes party committee to fill vacancy when candidate dies or resigns before primary but after last day in which any other party may file; that same section does not authorize committee to fill vacancy when no one files; and that same section does not require party committee to fill vacancy before primary.



September 18, 1956,

Honorable John W. Mitchell
Secretary
Jackson County Board of
Election Commissioners
Court House
Independence, Missouri

Dear Mr. Mitchell:

We hereby acknowledge receipt of your letter of recent date requesting an official opinion from this office involving Section 120.550, Mo. Cum. Supr., 1955. Your letter reads as follows:

"We request an opinion from your office on the following two questions.

"1. In the recent primary there were four votes cast for an elector for the office of prosecuting attorney. This particular office on the Republican ticket there was no candidate on the ballot as the candidate who originally filed had withdrawn before the primary. Shall we as Election Commissioners place on the printed ballot for the General Election the name of this individual who received four write in votes?

"2. This question partially involves the above question. An elector had filed for the office of Prosecuting attorney, but, before the Primary and after the time of filing for this office had passed, he withdrew. Can the political party County Committee fill the vacancy and certify to the Election Board or the County Clerk a candidate whose name then should appear on the ballot for the General Election? If the candidate withdrew before the close of the filing could the political County Committee fill the vacancy? Did the County Committee have to fill the vacancy before the Primary? The withdrawal was some sixty days before the Primary."

Honorable John W. Mitchell

Enclosed herein is the answer to your first question. It is a copy of an official opinion from this office written in 1946 to the Honorable David W. Hill, Prosecuting Attorney of Butler County. In short, the opinion holds that election officials should not place the name of a person on the ballot for the general election whose name was "written in" on the primary ballots, when such person had not filed any declaration of candidacy. The statute sections quoted in the opinion are still the law.

Your next three questions involve the interpretation of Section 120.550, Mo. Cum. Supp., 1955. This is new law enacted in 1953, and there are no Missouri cases interpreting it. The law reads as follows:

"1. The party committee of the county, district or state, as the case may be, shall have authority to make nominations in the following cases:

(1) When a vacancy in the candidates for nomination as a party candidate for election to any office shall occur by reason of death or resignation after the last day in which a person may file as a candidate for nomination;

(2) When any person nominated as the party candidate for any office shall die or resign before election;

(3) When a vacancy in office which is to be filled for the unexpired term at the following general election, shall occur after the last day in which a person may file as a candidate for nomination.

"2. Nominations to fill such vacancies shall be filed, as the case may be, either with the secretary of state not later than fifteen days before the day fixed by law for the election of the person in nomination or with the election authority not later than ten days before such election.

"3. No name shall be allowed on the ballot until the required fee has been paid."

The first part of this section covers the situation you have mentioned in your second question, where a candidate dies or resigns before the primary but after the last day in which a person may file as a candidate for nomination. Thus, there is a vacancy under the statute, and the party committee shall have authority

Honorable John W. Mitchell

to nominate a candidate. Since the candidate you mention for prosecuting attorney on the Republican ticket withdrew about sixty days before the primary, but after the date in which any other person could file for the office, there is a vacancy for the office of prosecuting attorney on the Republican ticket, and the Republican party committee of Jackson County has statutory authority to nominate a candidate.

You next ask, "If the candidate withdrew before the close of the filing could the political county committee fill the vacancy?" Enclosed herein is the answer to that question. It is a copy of an official opinion from this office written in 1942 to the Honorable Dwight H. Brown, the Secretary of State. In short, the opinion holds that the county committee has no authority to fill a vacancy where no person offers himself as a candidate before the primary. The statute mentioned in the opinion is now Section 120.550, supra. The statute has been amended and additions made, but the enclosed opinion is still the law on the question you ask.

Your final question is, "Did the county committee have to fill the vacancy before the primary?"

The answer is no, although the county committee may fill the vacancy before the primary. If there is a situation in which a vacancy exists under the new law mentioned, supra, and the party committee makes a nomination, their only duty is to file the name of the nominee, as the case may be, "either with the secretary of state not later than fifteen days before the day fixed by law for the election of the person in nomination or with the election authority not later than ten days before such election." The word "election" used here, means the general election in November.

The law also states that no name shall be allowed on the ballot (in November) until the required fee has been paid.

CONCLUSION

Therefore, it is the opinion of this office that the election officials should not place the names of persons on the ballot for the general election whose names were "written in" on the primary ballots, when such persons had not filed any declaration of candidacy; that Section 120.550, Mo. Cum. Supp., 1955, authorizes the party committee to make nominations when a vacancy exists in the candidates for nomination as a party candidate for election to any office where a candidate dies or resigns before the primary but after the last day in which a person may file as a candidate for nomination; that the same section does not authorize the party committee to nominate a candidate and fill a vacancy where no person offers himself as a candidate before the primary; and, that the same section does not require the party committee to fill the vacancy and make a nomination before the primary.

Honorable John W. Mitchell

The foregoing opinion, which I hereby approve, was prepared by my Assistant, George E. Schaaf.

Yours very truly,

John M. Dalton
Attorney General

GES/b1

Enclosures - 2

MOTOR VEHICLE:
DRIVER'S LICENSE:
CONVICTION:

A driver's license may not be revoked or suspended for one conviction of careless and reckless driving although party may have been guilty of careless and reckless driving resulting in the death of another.

May 31, 1956



Honorable J. Whitfield Moody
Prosecuting Attorney
Daviness County
Gallatin, Missouri

Dear Mr. Moody:

Reference is made to your request for an official opinion of this department reading as follows:

"I would appreciate your opinion concerning the application of Missouri Statutes sections 302.271 and 302.281, Laws of 1951, and as revised in 1955. The facts and circumstances are as follows:

"The accused is charged by information of 'careless, reckless and imprudent driving' of a motor vehicle in such a manner as to endanger the lives and property of others and as a result thereof caused the death of three persons, the charge being based on Section 304.010 Revised Statutes of Missouri 1949. The offense occurred on December 30, 1954.

"Section 302.271(7) Laws of 1951 provides for the revocation, and section 302.281(1) Laws of 1951 provides for a suspension of the driver's license of a person upon conviction of any offense involving wanton and reckless operation of a motor vehicle which has resulted in the death of another.

"Question 1: May a person convicted of careless, reckless and imprudent driving under section 304.010 Missouri Revised Statutes, 1949, have his driver's license revoked under section 302.271(7) or suspended under section 302.281(1) Laws of Missouri, 1951, when the latter sections include the word wanton and reckless operation of a motor vehicle?

Honorable J. Whitfield Moody

"Question 2: Do sections 302.271(7) and 302.281(1) Laws of Missouri, 1955, which became effective August 29, 1955, allow revocation or suspension of a driver's license upon conviction of careless, reckless and imprudent driving under section 304.010 where a person was killed when the offense was committed prior to August 29, 1955, but the conviction was not until after that date?"

Further reference is made to your letter of March 27, 1956, as follows:

"I have reviewed your letter of March 21st and the enclosed opinion and it is my understanding that it is impossible to revoke a person's drivers license under Section 302.271(7) or suspend them under Section 203.281(1), Laws of Missouri 1951 under a charge of Careless and Reckless Driving.

"This answers question one of my letter of March 9th, and as you stated in your letter the major question now becomes whether or not a person convicted of Careless and Reckless Driving can have his license revoked or suspended by reason of such conviction under Section 302.271(7) and 302.281(1), Laws of Missouri 1955, when the offense occurred before the effective date of the present law, and the conviction was after the effective date."

Prior to the enactment by the General Assembly of the present Sections 302.271 and 302.281, Cum. Supp. 1955, there was in effect in regard to careless driving Section 302.270, Laws of Missouri 1951, p. 79 at 688 and Section 302.280, Laws of Missouri 1951, p. 79, at 688. These sections were as follows:

"The director shall forthwith revoke the license of any operator or chauffeur upon receiving a record of such operator's or chauffeur's conviction of any of the following offenses, when such conviction has become final:

- (1) Manslaughter resulting from the operation of a motor vehicle;

Honorable J. Whitfield Moody

(2) Driving a motor vehicle under the influence of intoxicating liquor or a narcotic drug;

(3) Any felony in the commission of which a motor vehicle is used;

(4) Leaving the scene of an accident knowing that injury has been caused to a person or damage has been caused to property without stopping and giving his name, residence, including city and street number, to the injured party, or to a police officer, or to other proper person, as required by law;

(5) Perjury or the making of a false affidavit to the department of revenue under this chapter or under any other law relating to the ownership or operation of motor vehicles;

(6) Conviction, or forfeiture of bail not vacated, upon three charges of careless or reckless driving committed within a period of two years.

(7) Any offenses involving the wanton and reckless operation of a motor vehicle which has resulted in the death of another."

"Section 302.280. The director shall suspend the license of an operator or chauffeur for a period of not to exceed one year, upon a showing by the records of the director or any public records that the operator or chauffeur

(1) Has caused the death or personal injury of another or serious property damage by his wanton and reckless operation of a motor vehicle;

(2) Is an habitual reckless or negligent driver of a motor vehicle;

(3) Is an habitual violator of traffic laws;

(4) Had been convicted by a magistrate or circuit court of unlawful or fraudulent use of such license;

Honorable J. Whitfield Moody

"2. The director shall suspend the license of any operator or chauffeur upon a showing by the records of the director or any public records that such operator or chauffeur has an unsatisfied judgment against him, as defined in chapter 303, RSMo 1949, until such judgment has been satisfied or the financial responsibility of such person, as defined in section 303.120, RSMo 1949, has been established."

In 1955, effective August 29, 1955, the above sections were repealed and the following sections were enacted, Section 302.271, 1955 Cum. Supp., as follows:

"The director, circuit judge or magistrate shall forthwith revoke the license of any operator or chauffeur upon receiving a record of such operator's or chauffeur's conviction in any circuit or magistrate court of any of the following offenses, when such conviction has become final:

- (1) Manslaughter resulting from the operation of a motor vehicle;
- (2) Driving a motor vehicle under the influence of intoxicating liquor or a narcotic drug;
- (3) Any felony in the commission of which a motor vehicle is used;
- (4) Leaving the scene of an accident knowing that injury has been caused to person or damage has been caused to property without stopping and giving his name, residence, including city and street number to the injured party, or to a police officer, or to other proper person, as required by law;
- (5) Perjury or the making of a false affidavit to the department of revenue under this chapter or under any other law relating to the ownership or operation of motor vehicles;
- (6) Conviction, or forfeiture of bail not vacated, upon three charges of careless or reckless driving committed within a period of two years;

Honorable J. Whitfield Moody

(7) Any offenses involving the careless and reckless operation of a motor vehicle which has resulted in the death of another."

And Section 302.281, Cum. Supp. 1955, as follows:

"The director, circuit judge or magistrate shall suspend the license of an operator or chauffeur for a period of not to exceed one year, upon a showing by the records of the director or any public records that the operator or chauffeur;

(1) Has caused the death or personal injury of another or serious property damage by his careless and reckless operation of a motor vehicle;

(2) Is an habitual reckless or negligent driver of a motor vehicle;

(3) Is an habitual violator of traffic laws;

(4) Had been convicted by a magistrate or circuit court of unlawful or fraudulent use of such license.

"2. The director shall suspend the license of any operator or chauffeur upon a showing by the records of the director or any public records that such operator or chauffeur has an unsatisfied judgment against him, as defined in chapter 303, RSMo, until such judgment has been satisfied or the financial responsibility of such person, as defined in section 303.120, RSMo, has been established."

Upon examination and analysis of the two sets of sections set forth in the foregoing, it may be noted that the major deviation from the old sections (1951) to the new, (1955), is found in the words "wanton and reckless" which have now been replaced by the words "careless and reckless."

An opinion to Honorable M. E. Morris, September 22, 1954, is enclosed herewith. That opinion is to the effect that under Section 302.270 of 1951, there could be no revocation for the conviction of careless driving only. It is pointed out in that opinion that:

Honorable J. Whitfield Moody

"Neither the 'wanton and reckless operation of a motor vehicle, which has resulted in the death of another' as set forth in Subsection (7) of said Section 302.271, nor the 'wanton and reckless operation of a motor vehicle' as set forth in Subsection (1) of said Section 302.281, are defined or made criminal offenses by the statutes of this state. The power to define and pronounce any act upon the part of any person to be a criminal offense is vested solely in the legislative branch of the state government. * * *"

The opinion said further that in setting forth what constitutes a criminal act, a statute must set forth the facts constituting the crime with such certainty that the defendant may have notice of what he is called upon to meet and controvert and that the court, applying the law to the facts charged, may say that an offense has been committed.

2d

In State vs. Reynolds, 274 S.W./514, at l.c. 516, the Springfield Court of Appeals quoting from State vs. Ball, 171 S.W. 2d 787, stated as follows:

"Such charges of 'careless' and 'imprudent' operation of his car on the part of defendant, coupled with the allegation of the facts as to the manner of such careless and imprudent operation, charged conduct which was obviously contrary to and in violation of the statute, Section 8383, supra, and it constitutes a penal offense when considered in connection with the allegations of violation of Section 8385(b), supra. Punishment for said unlawful conduct is not provided for elsewhere in the laws governing motor vehicles, and, therefore, it comes within Section 8404(d) * * *.' (Italics ours.)"

In State vs. Ball, 171 S.W. 2d 787, wherein defendant was charged in an information with operating a motor vehicle " * * * while his mental facilities were slowed and dimmed by reason of his having consumed intoxicating liquor," a motion to strike was sustained by the trial court as to that phrase, l.c. 789. The appellate court made no comment as to the propriety of the action of the lower court. The foregoing cases are cited to show that in order to be suspended for a violation under the driver's license law, there must be a trial and conviction of the offenses stated under that law. Of course, under Section 302.281, Cum. Supp. 1955, subsection (2) and 302.010, subsection (7), an habitual careless and negligent driver is one who has been found

Honorable J. Whitfield Moody

guilty at least two times within two years of careless and reckless driving. From the context, it is not believed that the appellate courts will uphold the revocation of a driver's license for causing the death of another by careless and reckless operation of a motor vehicle or the suspension under Section 302.281 for that offense, no record of a conviction of such a violation of the criminal code of Missouri being obtainable.

Manslaughter, as outlined in subsection (1), Section 302.271, supra, is an entirely different offense since it involves "culpable negligence." State vs. Millin, 300 S.W. 2d 694, 697.

An offender must be charged with a final judgment of having done those things that are denounced by the statute in order to properly have his operator's license suspended or revoked. Under the facts gleaned from your opinion request, it is fairly evident that prosecution and conviction in the case mentioned for manslaughter is possible. It is felt that, through the repeal and re-enactment, the driver's license law in regard to manslaughter, was left intact. The retrospective effect of the new law in regard to manslaughter cannot be brought into question because the new law amounts to a re-enactment of the former law. Section 1.120, RSMo 1949, is as follows:

"The provisions of any law or statute which is re-enacted, amended or revised, so far as they are the same as those of prior laws, shall be construed as a continuation of such laws and not as new enactments."

CONCLUSION

It is the opinion of this office that a driver's license may not be revoked in accordance with Section 302.271, Cum. Supp. 1955, or suspended in accordance with Section 302.281, Cum. Supp. 1955, for one conviction of careless and reckless driving although the party may have been guilty of careless and reckless driving resulting in the death of another.

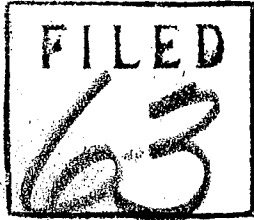
The foregoing opinion, which I hereby approve, was prepared by my assistant, James W. Faris.

Yours very truly,

JOHN M. DALTON
Attorney General

JWF/b1

ANIMALS:
MISSOURI
STOCK LAW:



A township may hold an election as to whether the stock law is to be retained in such township even though the township has previously voted to adopt the stock law or even though the county in which the township is located has had such an election, has voted to adopt the stock law. Also, once a county has voted to adopt the stock law, there is no authority for it to again vote upon the same issue.

September 24, 1956

Honorable Richard D. Moore
Prosecuting Attorney
Howell County
West Plains, Missouri

Dear Mr. Moore:

Your recent request for an official opinion reads:

"Last primary election, under county wide election, this county voted in favor of restraining animals from running at large under the provisions of Chapter 270, RS 49. After the election, the County Clerk published notice that the law would be in force within ninety days after the primary election to give people ample time to make provisions to restrain their livestock.

"Now the County Court has received petitions from several separate townships asking for elections in these separate individual townships on the question of the restraining of livestock. They have also received a petition asking for another election on a county wide basis.

"Could you please give me your opinion as to whether or not the petition for another election on a township basis would lie before the law restraining the livestock on a county wide basis became operative at the end of the ninety day period? Also, if the County Court receives petitions for an election on a township basis and a petition for election on a county wide basis at the same time, which petition would prevail?

"It is my understanding that under the recent cases, a township election would

Honorable Richard D. Moore

be permitted on a question of whether or not to let the animals run at large even though there had been a county wide election in which it was voted to restrain them from running at large. Would you let me know if this is your view on the matter?"

All references to statutes in this opinion will be to Revised Statutes of Missouri, 1949, unless otherwise indicated.

The law providing for the holding of a county-wide election to vote upon the proposition as to whether the stock law shall be adopted is found in Section 270.090, which reads:

"The county court of any county in this state, upon the petition of one hundred householders of such county, at a general election, and may upon such petition of one hundred householders, at a special election, called for that purpose, cause to be submitted to the qualified voters of such county the question of enforcing, in such county, the provisions of this chapter. Said petitioners shall state in their petition to said court what species of the domestic animals enumerated in section 270.010 they desire the provisions of this chapter enforced against, and may include one or more of said animals in said petition; and said court shall cause notice to be given that such vote will be taken, by publishing notice of the same in a newspaper published in such county, for three weeks consecutively, the last insertion of which shall be at least ten days before the day of such election, and by posting up printed notice thereof at three of the most public places in each township in such county, at least twenty days before said election; said notices shall state what species of domestic animals on which the vote will be

Honorable Richard D. Moore

taken, to enforce the provisions of this chapter against running at large in such county, which shall be the same as petitioned for to said court."

The law providing for the holding of township elections to determine whether the stock law shall be adopted in those townships (or if the stock law has been previously adopted to determine whether it shall be continued or rejected) is found in Section 270.130, which reads:

"Whenever two or more townships in one body in any county in the state of Missouri, by petition of one hundred householders, not less than ten of whom shall be from any one of said townships, petition the county court for the privilege to vote on the question of restraining horses, mules, asses, cattle, goats, swine and sheep from running at large, the same law governing counties is hereby applied to said townships, and said petitioners shall not be debarred the right to restrain said animals if a majority of the qualified voters of said townships, voting at any general or special election, shall vote in favor of so restraining such animals. Nothing in this section shall be so construed as to debar the right of restraining any two or more species of such animals; provided, however, that nothing in this section or chapter shall be construed to prevent the petitioning for and holding of an election to permit animals to run at large in any township or townships that have voted to restrain said animals from running at large, notwithstanding the county or township has theretofore voted to restrain animals from running at large." (Emphasis ours.)

The underlined portion of the above section makes it amply plain that such an election may be called to vote on the matter of whether the stock law shall be retained or

Honorable Richard D. Moore

rejected even though the county has previously voted to adopt the stock law.

This was not always the situation. In 1941 the Springfield Court of Appeals rendered a decision in the case of State v. Statler, 146 S.W. 2d 853. At l. c. 855, of that opinion, the court stated:

"Reduced to its simplest form, the question for determination is whether or not the statute makes any provision for a county that has adopted the provisions of the law restraining stock from running at large, to then petition for another vote, or whether any three of the townships in such county may petition for and be allowed another vote upon such question?

"We have been cited several cases where different provisions, as to what is commonly referred to as the stock law, have been discussed by the courts of this state. Among these cases are State ex rel. Browning v. Juden, Mo. App., 264 S.W. 101; State ex rel. Sturgeon v. Bishop, 195 Mo. App. 30, 189 S. W. 593; Weaver v. Bryan, 225 Mo. App. 385, 35 S.W. 2d 639; Wells v. Null, 208 Mo. App. 650, 235 S.W. 464; State ex rel. Rippee v. Forest, 177 Mo. App. 245, 162 S.W. 706. This last case gives a history of stock law legislation.

"None of these cases are applicable to the facts in this case. So far as we can ascertain, none of the cases cited, nor have we found any, that are applicable to a case that is an attempt to set aside the stock law that has once been approved by the voters of a county. We are not unmindful of the vote of the people in the three townships involved in this proceeding. The vote being 85 for the stock law to 1368 against it. But as we read the statutory law, we find no statutory provision of any

Honorable Richard D. Moore

kind that provides for the repeal of the law in a county, or in any part of a county after the law has been approved as it admittedly was done in this case. If the people in these three townships should have relief from what they think is an unpopular law, their remedy is with the legislature to obtain legislation along such lines."

This case was tried under the 1929 statutes and, we believe, reached the correct result in view of the statutes upon which the opinion was based. However, in 1945, the 63rd General Assembly amended the stock law by adding a new section (14470a, Volume 1, page 106) which reads:

"Whenever two or more townships in one body in any county in the state of Missouri, by petition of one hundred householders, not less than ten of whom shall be from any one of said townships, petition the county court for the privilege to vote on the question of restraining horses, mules, asses, cattle, goats, swine and sheep from running at large, the same law governing counties is hereby applied to said townships, and said petitioners shall not be debarred the right to restrain said animals if a majority of the qualified voters of said townships, voting at any general or special election, shall vote in favor of so restraining such animals. Nothing in this section shall be so construed as to debar the right of restraining any two or more species of such animals: Provided, however, that nothing in this section or article shall be construed to prevent the petitioning for and holding of an election to permit animals to run at large in any township or townships that have voted to restrain said animals from running at large."

In 1947, the 64th General Assembly further amended the stock law by Section 14470a (Volume 1, page 28, Laws of Missouri) which reads:

Honorable Richard D. Moore

"Whenever two or more townships in one body in any county in the state of Missouri, by petition of one hundred householders, not less than ten of whom shall be from any one of said townships, petition the county court for the privilege to vote on the question of restraining horses, mules, asses, cattle, goats, swine and sheep from running at large, the same law governing counties is hereby applied to said townships, and said petitioners shall not be debarred the right to restrain said animals if a majority of the qualified voters of said townships, voting at any general or special election, shall vote in favor of so restraining such animals. Nothing in this section shall be so construed as to debar the right of restraining any two or more species of such animals: Provided, however, that nothing in this section or article shall be construed to prevent the petitioning for and holding of an election to permit animals to run at large in any township or townships that have voted to restrain said animals from running at large, notwithstanding the county or township has theretofore voted to restrain animals from running at large."

This last amendment, it will be noted, brings the law up to its present form, with the result, as is plainly stated in the law, that a township, even though it has previously adopted the stock law, or is located in a county which has wholly adopted the stock law, may, upon proper petition, vote upon the proposition whether the law is to be retained or rejected.

We do not find any authority for a county to hold an election on this matter once it has had such an election and has voted to adopt the stock law. The Statler case, referred to above, held that it did not have such authority. Section 270.130, enacted and amended subsequent to the Statler decision, clearly gave that right to townships, but not, so far as we can see, to counties.

Honorable Richard D. Moore

CONCLUSION

It is the opinion of this department that a township may hold an election as to whether the stock law is to be retained in such township, even though the township has previously voted to adopt the stock law, or even though the county in which the township is located has had such an election, has voted to adopt the stock law.

It is the further opinion of this department that once a county has voted to adopt the stock law, there is no authority for it to again vote upon the same issue.

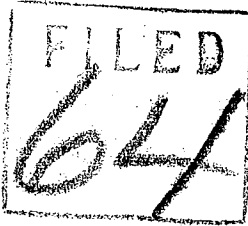
The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

HPW:lc

Taxation: Cigarette tax collections should be deposited
in state treasury pending outcome of litigation
CIGARETTE TAX: regarding its constitutionality.



January 20, 1956

Honorable M. E. Morris
Director of Revenue
Jefferson Building
Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this office,
which request reads as follows:

"This department has started collection
of the new Cigarette Tax, which is to be
deposited with the State Treasurer, to
the credit of the Public School Moneys
Fund.

"In view of the appeal in the case,
which attempts to have the new law
declared unconstitutional, I am writing
to inquire whether or not we should im-
pound the collections, pending the dis-
posal of the litigation or, if your
advice would be to deposit the money
with the State Treasurer."

Section 149.100, RSMo, 1955 Supp., dealing with the cigarette
tax, provides:

"All taxes collected pursuant to this
chapter shall be deposited in the state
treasury to the credit of the state school
moneys fund."

Section 15 of Article IV of the Constitution of Missouri,
1945, provides, in part, as follows:

"The state treasurer shall be custodian of
all state funds. All revenue collected and
moneys received by the state from any source
whatsoever shall go promptly into the state

Honorable M. E. Morris

treasury, and all interest, income and returns therefrom shall belong to the state. Immediately on receipt thereof the state treasurer shall deposit all moneys in the state treasury to the credit of the state in banking institutions selected by him and approved by the governor and state auditor, and he shall hold them for the benefit of the respective funds to which they belong and disburse them as provided by law. * * *

Section 136.110, RSMo 1949, provides, in part:

"The state collector of revenue shall promptly record all sums of money collected or received by him and shall immediately thereafter deposit the same with the state treasurer. * * *

There is no statutory authority giving the Collector of Revenue any right to impound in a special fund a tax collected by him. The case of Brown et al. v. Morris et al., now pending in the Missouri Supreme Court, to which you refer in your opinion request, is an action for a declaratory judgment. No relief by injunction against collection of the tax was requested. There has been no judicial order requiring the impounding in a separate account of the proceeds of the tax pending determination of the cause.

Under such circumstances, we are of the opinion that the Collector of Revenue has no discretion as to the disposition of the proceeds of the tax and must, under the constitutional and statutory provisions above quoted, deposit the proceeds in the state treasury. His disposing of the proceeds of the tax in such manner would not, in our opinion, impose personal liability upon the Collector of Revenue even should the statute eventually be held unconstitutional. In the case of Kleban v. Morris, 247 SW2d 832, the court discussed the question of personal liability of a tax collector who collects a tax and transmits it to the treasury when the tax is subsequently found illegal. In that case the court stated, 247 SW2d 1.c. 838:

"State ex rel. American Mfg. Co. v. Reynolds, 270 Mo. 589, 600(II), 194 S.W. 878, 880(II) (American Mfg. Co. v. Alt, Mo. App., 184 S.W. 1167, 1169) review denied, 245 U.S. 635, 650, 38 S. Ct. 189, 10, 62 L. Ed. 523, 531, was a suit against the License Collector of St.

Honorable M. E. Morris

Louis, Missouri, for the refund of a State tax, held to be illegal, after the tax had been transmitted to and deposited in the state treasury. The court took judicial knowledge of the fact that the collector had transmitted and paid the tax into the state treasury, and followed *Lewis County v. Tate*, 10 Mo. 650, 651, which states: 'The money thus collected was paid over into the county treasury. Whatever may be the liability of the county - and of this we are not authorized to give an opinion - it is clear that the collector is not liable.' The court also quoted statements from *Meechem's Public Offices and Officers*, § 649, and *Cooley on Taxation* (3rd Ed.), p. 1482, to the effect that a collector, who collects taxes, although by compulsion, under color of law and pays the taxes over to the proper receiving officer, is protected and is not responsible in instances where his authority was void for unconstitutionality or other reasons. The court remarked: 'To hold a collector responsible individually would be a harsh rule, and one which we do not care to follow. The Legislature, upon proper application, would no doubt reimburse the plaintiff from the state treasury.' * * *

CONCLUSION

Therefore, it is the opinion of this office that the fact that there is now pending an appeal to the Missouri Supreme Court in which it is sought to have the Cigarette Tax law declared unconstitutional does not require the proceeds of said tax to be impounded in a special fund pending outcome of the litigation and that the proceeds of such tax should be deposited with the State Treasurer.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

Yours very truly,

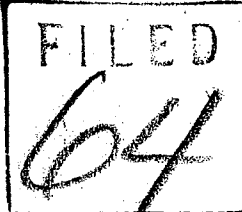
JOHN M. DALTON
Attorney General

RRW:ml

EDUCATIONAL AND RELIGIOUS CORPORATIONS:
EXEMPTION FROM TAXATION:
PROPERTY INCAPABLE OF DIVISION:

(1) The real estate owned by the Belin Memorial University is exempt from taxation to the extent that it is used exclusively for educational and

religious purposes. (2) Any property now being used exclusively for religious and educational purposes which subsequently may be used otherwise, will become subject to taxation upon such use. (3) Only the property which is used otherwise than for religious and educational purposes is subject to taxation, except that property incapable of division, some of which is used exclusively for religious and educational purposes and some of which is used otherwise, is taxable in its entirety.



April 9, 1956

Honorable J. P. Morgan
Prosecuting Attorney
Livingston County
Chillicothe, Missouri

Dear Mr. Morgan:

This will acknowledge receipt of your opinion request of March 20, 1956, which is as follows:

"Belin Memorial University which was originally incorporated by pro forma decree in the Circuit Court of St. Louis on October 21, 1954, has recently purchased the real estate of the old Chillicothe Business College. They have now moved their faculty and students to Chillicothe and have now petitioned the County Court for the removal of such property from the assessment books for purposes of taxation.

"The following was copied from the objects and purposes of their Articles of Incorporation and is as follows:

'A. The objects and purposes for which this corporation is formed are the general aim and purpose of serving all Pentecostal people, their churches, and others in the furtherance of promulgating the gospel of the Lord Jesus Christ.

B. The special objects and purposes for which this corporation is formed are the following:

1. To establish, maintain and conduct a suitable organization to manage the affairs of this corporation.

Honorable J. P. Morgan

2. To create, establish, maintain and conduct seminaries, schools, colleges and/or universities in the United States and all foreign countries for the purpose of giving theological education and such other instruction as may be needful and advantageous in preparing and qualifying Ministers, Missionaries and other persons for Christian work, with or without the power to grant such literary, theological, professional or scientific honors or degrees as are usually granted by any seminary, school, college or university in the United States or any foreign country to such students of any such institutions who complete any courses of instruction offered and become entitled thereto; and in testimony thereof to give suitable diplomas and degrees under the seal of the corporation and in accordance with the rules promulgated by the board; and in connection therewith to exercise all powers, rights and duties appertaining to institutions of learning provided for or authorized under laws of the State of Missouri, the United States or any foreign country.'

"The Articles had many further provisions providing for the ownership and operation of radio and T-V stations and very general terms as to the ownership and management of property.

"The County Court has asked that I refer the following questions to you.

1. Is the real estate owned by the school exempt from taxation?

2. The college has already expressed its intention to sub-divide land owned by it immediately adjacent to the City of Chillicothe for the purpose of selling lots and the further purpose of the constructions of homes by it for later resale to the public for profit with such profits, if any, to go to the college. Would such activity result in tax liability if the answer to question #1 is no and if it does make the same taxable does it apply to all of their real estate or only that being promoted for sale of residence properties?"

Honorable J. P. Morgan

Article X, Section 6 of the 1945 Constitution of Missouri is as follows:

"All property, real and personal, of the state, counties and other political subdivisions, and nonprofit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."

Section 137.100, subsection 6, V.A.M.S., is as follows:

"The following subjects shall be exempt from taxation for state, county or local purposes:

"(6) All property, real and personal actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable, and not held for private or corporate profit shall be exempted from taxation for state, city, county, school, and local purposes; provided, however, that the exemption herein granted shall not include real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom be used wholly for religious, educational or charitable purposes."

The Supreme Court of Missouri has repeatedly held that a claim for tax exemption must be strictly construed against the property owner and in favor of the public, but the construction must be a reasonable construction. *Salvation Army v. Hoehn*, 188 S.W. 2d 826, 354 Mo. 107.

From the objects and purposes clauses of the Articles of Incorporation, it appears that the Belin Memorial University is a religious and educational corporation. If so, it falls within the tax-exempted classes as set out in the two above-quoted sections. It has been held that the classification as a religious or charitable corporation for purposes of exemption from taxation must be based upon the articles of association, concessions and

Honorable J. P. Morgan

activities of the corporation. Evangelical Lutheran Synod of Missouri, Ohio and Other States vs. Hoehn, 196 S.W. 2d 134, 355 Mo. 257. As stated, however, it appears from the objects and purposes clauses that the Belin Memorial University is a religious and educational corporation, and, there being nothing to indicate that the said university is operating otherwise, it must be presumed that it is a religious and educational corporation.

It is further provided in the above-quoted sections that in order for the property to be exempt, it must not be held for private or corporate profit. From the facts set out in the opinion request, there is nothing to indicate that the property owned by Belin Memorial University is held for private or corporate profit. Rather it appears that Belin Memorial University purchased the real estate from the Chillicothe Business College for the purposes set forth in the objects and purposes clauses of its Articles of Incorporation.

The sections also provide that the property, in order to be exempt from taxation, must be used exclusively for religious worship, for schools and colleges, or for purposes purely charitable with the provision that the property will not be exempt from taxation if used as an investment even though the income or rentals received therefrom be used wholly for religious, educational or charitable purposes. Most of the litigation over tax exemption by institutions of the nature of Belin Memorial University, has involved a construction of this particular part of the two sections. And its application will be the solution to the questions raised in the opinion request.

The Supreme Court of Missouri, in a number of cases, has held that the property must be used exclusively for the purposes for which it is exempt from taxation; that where the occupation and use primarily commercial in character are carried on for revenue even though the revenue be used for such charitable purposes, the property is not exempt from taxation.

See the case of Evangelical Lutheran Synod of Missouri, Ohio and Other States vs. Hoehn, supra, at l.c. 146 where the court said:

"The Hairenik case from Massachusetts thus stated the rule. 'It is settled that the "occupation of real estate by an institution which entitled it to exemption of such real estate is occupation directly for the charitable purposes for which it is incorporated and not occupation for profit even if such profit is used for such charitable purposes.'" * * *

Honorable J. P. Morgan

The "distinction is between activities primarily commercial in character carried on to obtain revenue to be used for charitable purposes * * * and activities carried on to accomplish directly the charitable purposes of the corporation, incidentally yielding revenue."

In the case of State ex rel. Koehn vs. St. Louis Young Men's Christian Association, 259 Mo. 233, 168 S.W. 589, the defendant owned two buildings of which 15 per cent of the floor space was rented. The court, in holding that none of the property was exempt from taxation, at l.c. 237, said:

"* * * The ruling in the Fitterer case (157 Mo. 51) is a construction of our present Constitution and Statute, and holds that a building owned by a Masonic lodge, on account of the charitable designs and practices of such lodge, is exempt from taxation, so long as it is used exclusively for such lodge purposes, but when two of the floors of such building are rented for commercial purposes then the entire building becomes subject to taxation. In deciding that case it was said: 'There is a very material difference between the "use of a building exclusively for purely charitable purposes," and renting it out, and then applying the proceeds arising therefrom to such purposes. To rent out a building is not to use it within the meaning of the statute, but in order to use it, it must be occupied or made use of. Moreover, by leasing the property the lodge becomes the competitor of all persons having property to rent for similar purposes, and the plain and obvious meaning of the statute is that such property shall not be exempt from taxation.'

See the cases of Midwest Bible and Missionary Inst. vs. Sestric, 260 S.W. 2d 25 (1953) and St. Louis Council, Boy Scouts of America vs. Burgess et al., 362 Mo. 146, 240 S.W. 2d 684 (1951). In the latter case, the question was whether or not a 2300 acre tract of land owned by the Boy Scout Council and used in connection with the scouting program by boys for training purposes, should be exempt from taxation. The evidence showed that the entire acreage was not occupied at all times. However, the court held that it was not necessary that the land be so used in order for it to be exempt from taxation. The court, in holding that the tract was to be exempted from taxation, said at l.c. 687:

Honorable J. P. Morgan

"* * * It would be too narrow a construction of the tax exemption statute to hold that all of its property must at all times be used to its capacity to come within the purview of the statute. In other words, the evidence shows a present need for all of the property. It shows a present, actual, regular and exclusive user of all of the property for purposes purely charitable and that no part of it is held or used as an investment. The statute requires no more.* * *"

It having been decided, nothing appearing to the contrary, that Belin Memorial University is a religious and educational corporation whose property is not held for private or corporate profit, the question presented is, is the real estate owned by it exempt from taxation? The answer is that the property is exempt from taxation to the extent that it is used exclusively, as explained above, for the purposes set forth in the objects and purposes clauses of the Articles of Incorporation.

The lots or any other property owned by the university are, if used in a commercial character and not exclusively for educational and religious purposes, not exempt from taxation. And, it is immaterial as to what the university intends to do with said property. It is further immaterial that the revenue from said property may be used for educational and religious purposes.

If any property now being used exclusively for the purposes set forth in the objects and purposes clauses is subsequently used otherwise, such as being subdivided for the purpose of selling same, it will become taxable. Only that property which is used otherwise than for educational and religious purposes exclusively is subject to taxation, so long as said property is capable of division. If the property (see State ex rel. Koeln vs. St. Louis Young Men's Christian Association, supra) is incapable of division, then, even though a portion of it is used exclusively for the objects and purposes as set forth in the objects and purposes clauses, it is nevertheless subject to taxation.

CONCLUSION

It is therefore the opinion of this office that:

(1) The real estate owned by the Belin Memorial University is exempt from taxation to the extent that it is used exclusively for educational and religious purposes.

Honorable J. P. Morgan

(2) Any property now being used exclusively for religious and educational purposes which subsequently may be used otherwise, will become subject to taxation upon such use.

(3) Only the property which is used otherwise than for religious and educational purposes is subject to taxation, except that property incapable of division, some of which is used exclusively for religious and educational purposes and some of which is used otherwise, is taxable in its entirety.

Yours very truly,

JOHN M. DALTON
Attorney General

HLH/bi

MUNICIPALITY:
BONDS:
SECRETARY OF STATE:

Bonds issued by municipalities of Alabama under Act of General Assembly of Alabama, 1956, not subject to registration in this state under Section 409.040, RSMo 1949.



July 11, 1956

Mr. Jos. W. Mosby
Commissioner of Securities
Office Secretary of State
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion inquiring if under Section 409.040, Subsection 1, MoRS 1949, such bonds as issued by the City of Florence, Alabama, 5% mortgage industrial development bonds, a copy of which is attached to your request, are exempt from registration in this state.

Your request reads:

"Enclosed please find Prospectus and copy of 5% First Mortgage Industrial Development Revenue Bonds issued by the City of Florence, Alabama. Enclosed, also please find copy of letter addressed to the undersigned from Mr. Charles H. Luecking of St. Louis, Missouri. These enclosures are in regard to a certain security registration now pending in the Securities Department of the Office of Secretary of State. It is the contention of Mr. Luecking as attorney for the security registrant, that the First Mortgage Bonds of Florence, Alabama are exempt from registration under the Missouri Securities Law. In support of this contention, Mr. Luecking has cited subsection (1) of Section 409.040, R.S. Mo., 1949.

"The First Mortgage Bonds in question are being issued by the City of Florence, Alabama in connection with Common Shares of Stock being issued by the Sheraton Florence Corporation, a Delaware corporation.

Mr. Jos. W. Mosby

"The purpose of the registration is to provide funds for the building of a hotel in Florence, Alabama. The City of Florence, Alabama will not, upon completion, own any part of the hotel. Ownership of the hotel will be in the Sheraton Florence Corporation, a Delaware business corporation. The Sheraton Corporation of America will operate the hotel. This latter corporation will also hold controlling stock in the Sheraton Florence Corporation. The bonds in question will be retired from profits made through the operation of this hotel. The City of Florence, Alabama does not guarantee payment of the bonds in any manner. These bonds are not general obligation bonds of the City of Florence, Alabama, nor has the City mortgaged any property to secure payment of these bonds. At the present time the interest and income from these bonds is exempt from Federal Income Tax.

"In view of the foregoing, your opinion is respectively requested upon the following proposition.

"1. Does the exemption provided for in sub-section (1), Section 409.040, R.S. Mo., 1949, include securities of this type issued by the City of Florence, Alabama?

"In view of the fact that securities of this type could not be issued by political sub-divisions of the State of Missouri, would the sale of such bonds be against the public policy of this State-hence prohibiting the sale of such securities in the State of Missouri?"

We assume that you question whether such revenue bonds are exempt under the foregoing statute for the reason the principle and interest on said bonds are not required to be paid from taxes received by said city, as the foregoing statute refers to the issuance of any security by any state of the United States or any political subdivision having the power of taxation and for the further reason that similar privileges as requested herein are not afforded municipalities of this state.

The particular statute to be construed is Section 409.040 MoRS 1949, which reads, in part:

Mr. Jos. W. Mosby

"Except as herein provided, the provisions of this chapter shall not apply to any security which is within any of the following classes of securities:

"(1) Any security issued by, or the principal and interest of which are guaranteed by, the United States or any territory or insular possession thereof, or by the District of Columbia, or by any person controlled or supervised by and acting as an instrumentality of the United States, pursuant to authority granted by the Congress of the United States; or by any state of the United States or any political subdivision having the power of taxation; or by any agency or any public instrumentality of one or more of the states or territories or of the political subdivisions thereof;"

In *Storrs vs. Heck*, 190 So. 78, 1.c. 84, 238 Ala. 196, the Supreme Court of Alabama held that cities are political subdivisions of the state. Therefore we must hold that the City of Florence, Alabama is a political subdivision within the meaning of Section 409.040, *supra*.

We assume, for the sake of this opinion, that Section 8, Act #4 of the General Assembly of Alabama, 1956, as quoted in counsel's letter attached to your request, is correct and reads:

"Section 8. The proceeds from the sale of any bonds issued under authority of this act shall be applied only for the purpose for which the bonds were issued; provided, however, that any accrued interest and premium received in any such sale shall be applied to the payment of the principal of or the interest on the bonds sold; and provided further, that if for any reason any portion of such proceeds shall not be needed for the purpose for which the bonds were issued, then such unneeded portion of said proceeds shall be applied to the payment of the principal of or the interest on said bonds. The cost of acquiring any project shall be deemed to include the following: the actual cost of the construction of any part of a project which may be constructed, including architect's and engineer's fees; the purchase price of any part of a project that may be acquired by purchase, all expenses in connection with the authorization, sale and issuance

Mr. Jos. W. Mosby

of the bonds to finance such acquisition; and the interest on such bonds for a reasonable time prior to construction, during construction, and for not exceeding six months after completion of construction.'"

Furthermore, for sake of this opinion, we assume said act contains no further condition or obligation upon the City of Florence with respect to said bonds.

The foregoing presumptions are mentioned for the reason that the Missouri Supreme Court's Law Library does not contain any copies of legislation of the State of Alabama for 1956.

The interest and principal on said bonds are to be paid from revenue received from the operation of the hotel to be constructed from the proceeds of the sale of said bonds. Apparently the sole interest of the City of Florence in issuing said bonds is to secure for said City a greater industrial development.

There are several rules of statutory construction to consider in construing the foregoing statute the first one is that exemption provisions in the law must be strictly construed against the exemption. *Missouri Good Will Industries vs. Gruner*, 210 S.W.(2d) 38, 357 Mo. 647.

As was stated in *Midwest Bible and Missionary Inst. vs. Sestric*, 260 S.W.(2d) 25, claims for exemption from taxation are not favored in the law and, therefore, taxation is the rule and exemption the exception. We believe the same rule generally applicable to any exemption under the laws.

A primary rule of statutory construction is to ascertain the lawmaker's intent from the words used if possible and to put on the language of the Legislature honestly and faithfully its plain and rational meaning and to promote its object and manifest purpose of the statute. Also where no technical language is employed therein the words will be construed in their ordinary sense and with meaning commonly attributed to them unless such construction will defeat the manifest intent of the Legislature. *State ex inf. Rice ex rel. Allman vs. Hawk*, 360 Mo. 490, 228 S.W.(2d) 785.

Considering the language used in Section 409.040, supra, in the light of the foregoing rules of construction, we believe that the legislative intent in enacting said statute was to exempt from registration such bonds, notwithstanding the fact that said bonds are merely issued by such municipality having the power of taxation but with no further financial obligation or liability on the part of

Mr. Jos. W. Mosby

said municipality. All that the statute specifically requires said municipality to do is issue said bond and that it have taxing power.

"Issue" has been defined in Websters New International Dictionary, Second Edition, as follows:

"* * *1. To cause to issue; to emit; discharge.
2. To deliver, or give out, as for use, or, to issue provisions. 3. To send out officially; to deliver by authority; to publish or utter; to emit; as to issue an order, or writ."

In *Hidalgo Co. Drainage District v. Davidson*, 120 S.W. 849, 851, 102 Tex. 539, the Court in construing an act of the Legislature creating a drainage district desiring to issue bonds in accordance with said act, defined issue to mean, to put bonds into circulation by selling them.

In *Folks v. Yost*, 54 Mo. App. 55, 59, the Court held that the ordinary and commonly accepted meaning of "to issue" is to send, forward, to put into circulation, to emit, as to issue bank notes, bonds, etc. See also *State ex rel. Arn v. Woodruff*, 189 P.(2d) 899, 904, 164 Kan. 339.

We think it will be conceded under the foregoing facts and law in this case that the City of Florence is authorized to issue said bonds. Relative to the latter requirement that said municipality have taxing power we believe was added merely as a matter of identity. In short, it wanted only such municipalities having that power to tax, to have the right to issue such bonds. It must be admitted that if the Legislature had intended that interest and principal on such bonds should be paid from the revenue derived from taxation, it could have included such a proviso in the statute.

You further inquire, in view of the fact that securities of this type cannot be issued by political subdivisions of this state, would the sale of such bonds be against the public policy of this state, hence prohibit the sale of same in Missouri.

There apparently is no well established or precise definition of public policy in this state. However, the Court in *Rahn's Estate*, 291 S.W. 120, 316 Mo. 492, 51 A.L.R. 877, 1.c. 883, held that no provision in a will should be held void as against public policy unless it contravenes some positive expression of the settled will of the people as found in the Constitution, statutes and judicial decisions. Said court also approvingly quoted from other Missouri cases, likewise holding that when speaking of public policy of the

Mr. Jos. W. Mosby

state it means the law of the state whether found in the Constitution, statutes or judicial records.

Furthermore, while it is rather unusual to find any Missouri statute granting privileges more beneficial or favorable to other states than Missouri, we are cognizant of no law that prevents the Legislature from enacting such legislation which, incidentally, is applicable to no one state in particular, but would include Missouri if it chooses to come under it.

We do have statutes and constitutional provisions for municipalities and other political subdivisions in this state issuing revenue bonds, the principal and interest of the bonds payable solely from the revenue derived from the operation of such projects constructed as a result of the issuance of said bonds. See Section 27, Article VI, Constitution of Missouri, providing that cities or incorporated towns or villages of this state may issue revenue bonds for construction of certain water, gas or electric light works, heating or power plants or airports to be owned exclusively by the municipality. Also under Chapter 176, MoRS, 1949, it is provided that revenue bonds may be issued by state educational institutions for various projects, however, the interest and principal shall be paid from the net income and revenue of said projects. The only difference being that in those instances just referred to hereinabove such construction is usually owned exclusively by the municipality.

In view of the foregoing, we believe that such bonds are exempt from registration under the present law and, furthermore, that the public policy of the state will not prohibit the sale of said bonds.

CONCLUSION

Therefore, it is the opinion of this department that such bonds issue is exempt under and by provision of Section 409.040, Subsection 1, MoRS 1949. Furthermore, that the sale of such securities cannot be prohibited simply because same could not be issued under the same facts and circumstances by a municipality or political subdivision of this state.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

ARH:mw

John M. Dalton
Attorney General

DEPARTMENT OF
CORRECTIONS:
DENTAL CARE
TO INMATES:

Statute placing general supervision over care
of inmates implies the responsibility to fur-
nish dental care.



May 31, 1956

Honorable E. V. Nash
Warden
Missouri State Penitentiary
Jefferson City, Missouri

Dear Mr. Nash:

Your May 1 request for an official opinion from this office
was stated as follows:

"This office requests your opinion on the
following:

"a. MRS-Cumulative Supplement-1955-Sec-
tion 216.255, paragraph 1:

Duties of physician--

(1) Attend at all times the neces-
sities of the sick inmates,
whether they are in the hospi-
tals, in cells or elsewhere,
and bestow on them all neces-
sary medical services.

"(1) Under this section is the Department
of Corrections, State Penitentiary,
also responsible for the proper dental
care necessary to the health of the
inmate?

"(2) Is the Department of Corrections, State
Penitentiary, obligated to pay the total
cost incurred for such dental care as
is necessary for the health of the inmate?"

In addition to your questions you submitted a proposal re-
garding dental payments for our consideration. We deem it un-
necessary to repeat the proposal herein in view of our opinion.
Succinctly stated, your question is: Are "dental services"
included within the meaning of the term "medical services?"

We think, however that it is unnecessary to pass upon that
question specifically here. It is our opinion that the responsi-

Honorable E. V. Nash

bility for dental care devolves upon the State, as a part of its sovereign responsibility, and that such is specifically made the responsibility of the Division of Administration, more by Section 216.215, Cumulative Supplement 1955, than by 216.255.

The latter section specifies the duties of the physician in regard to one phase of the general term "care" as used in Section 216.215. In the event the State is responsible, which seems to be your main question, it is immaterial for the purposes of our opinion whether it is the responsibility of the physician to supervise the furnishing of dental care, or whether it is the duty of someone else. "Care," as used in Section 216.215, is not limited in its meaning.

In the case of *Arnold v. The United States*, C.C.A. (Colo.) 94 Fed. (2d) 499, 505, it is said: "'Care' is defined as to cause to have care; to trouble; to care for; to regard."

In the case of *Kelly v. Jeffries*, 19 Del. 286, 50 Atl. 215, it is said that a legacy for the care of a person is substantially the same as a legacy for his maintenance. The like effect was held in *Christy v. Pulliam*, 17 Ill. 58; *Cabeen v. Gordon*, 1 S.C. Rep. 51.

In the case of *Harlan v. Harlan*, 154 Cal. 341, 98 Pac. 32, it was held that "care", as used in a statute authorizing the court in a divorce action to give directions for the custody, care and education of children is, if not synonymous with "maintenance," a broader term, and when combined with custody and education (in our statute it is combined with "discipline") it includes every element of provision for the physical, moral and mental well-being of the children. The court further held that an order for the benefit of the children is within the jurisdiction of the court whether it uses the term "maintenance and support" or the broader expression "custody, care and education."

Certainly, there can be no argument about the State's "custody" of prisoners; "custody" meaning having "charge," "control," "possession." The statute places general supervision over such "custody" in the hands of the Division of Administration also.

As shown above, and as is generally understood in the use, the word "care," one having the "care" of an object or of an individual, has the responsibility for the safeguarding, safe-keeping, maintenance, general protection and preservation of

Honorable E. V. Nash

such object or individual. Naturally, as it pertains to an individual it involves the maintenance and general protection of the individual's health.

Since the State is liable for the "care" of prisoners our statute enjoins the general supervision over it upon the Division of Administration. If there were no responsibility for the care there would be no mention of the supervision over it.

Further, the care necessary under a given situation is a matter of degree. You ask about the "responsibility" for the proper dental care "necessary" to the "health" of the inmates. With dental care in addition to that we are not herein concerned.

CONCLUSION

It is, therefore, the opinion of this office that:

(1) Under Section 216.215, 1955 Cumulative Supplement, Revised Statutes of Missouri, wherein the Division of Administration is given the general supervision over the custody, care and discipline of all inmates, the Division of Administration is responsible for "the proper dental care necessary to the health of the inmate," and

(2) That under the same provisions the division is "obligated to pay the total cost incurred for such dental care as is necessary for the health of the inmate."

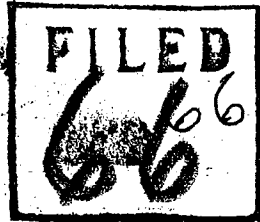
The foregoing opinion, which I hereby approve, was prepared by my assistant, Russell S. Noblet.

Very truly yours

John M. Dalton
Attorney General

RSN:lc

STATE PURCHASING
AGENT:
DIVISION OF PROCUREMENT:



The failure of a department to make such reports as are required by law would not relieve the State Purchasing Agent from his duty of maintaining a current inventory of removable property owned by the state. Further, the duty to maintain such inventory does not extend to removable property purchased by those departments not subject to the State Purchasing Agent's Act, and obtained under such exemption.

October 10, 1956

Honorable Edgar C. Nelson
State Purchasing Agent
Capitol Building
Jefferson City, Missouri

Dear Mr. Nelson:

This will acknowledge receipt of your recent request for an opinion which reads as follows:

"In Section 34140, Revised Statutes of Missouri, 1950, the State Purchasing Agent is directed to 'keep currently an inventory of all moveable equipment owned by the State'.

"At the beginning of each new fiscal year I send notices to all departments, institutional and commission heads for whom I buy supplies and service as State Purchasing Agent, requesting them to send in an up to date inventory. I have received very meager responses even though they are notified more than once.

"In attempting to get these inventories have I fulfilled my duty as set out in the section referred to? If not, what further steps should I take to comply with the directive?

"Incidentally, I have never been clear as to whether the directive includes those divisions of state that do their own buying, namely the Highway Department, the University and the Legislature. Please give me your opinion on this situation."

Section 34.140, to which you refer, reads as follows:

Honorable Edgar C. Nelson

"The purchasing agent shall have the power to transfer supplies from any department where they are not needed to any other department where they are needed and to direct that proper charges and credits be made on the inventories of the departments concerned. He shall also have power, subject to the same provisions as for bids for purchases, to sell any surplus or unneeded supplies or property in his hands or owned by the state or any department thereof. He shall keep currently an inventory of all removable equipment owned by the state."

Under date of June 7, 1947, this office issued an official opinion to Mr. William L. Smith, State Purchasing Agent, holding that it is the duty of the State Purchasing Agent under the above-named section to maintain a current inventory of removable equipment owned by the state. Said opinion further points out that in order to effectuate the obtention of such information, the State Purchasing Agent is empowered under the provision of Section 34.120 to require reports from the various departments. Thus, it is seen that it is the mandatory duty of the various departments, subject to the provisions of the State Purchasing Agent's Act, to make such reports of supplies on hand as may be required by the State Purchasing Agent. A copy of said opinion is enclosed herewith for your information.

Therefore, while we are of the opinion that it is entirely correct and proper to require such information as the State Purchasing Agent may deem necessary, by written notice directed to the various departments, we feel that it would be advisable, in any instance where there has been a failure to comply, to follow up with a personal contact in order that the need for and duty of filing such reports may be fully understood by all concerned. Therefore, in the event that a department fails to comply with the proper request, compliance could be obtained by appropriate legal proceedings. In other words, we do not believe that the failure of the department to make such reports as are required by law would relieve the State Purchasing Agent of his duty to maintain a current inventory of all removable equipment owned by the state.

Your next inquiry is whether the inventory required by Section 34.140 should include those departments of the state that do their own buying. You specifically refer to the Highway Department, the University, and the State Legislature. Here again we direct your attention to the enclosed opinion. Said opinion

Honorable Edgar C. Nelson

holds that the State Purchasing Agent is not required to keep an inventory of removable equipment under the control of departments specifically exempted from the provisions of the State Purchasing Agent's Act. The departments specifically exempted are the Legislative and Judicial Departments. (Sec. 34.010 RSMo 1949).

We are of the opinion that the reasoning contained in such opinion would likewise be applicable to other departments which, though not specifically mentioned in the exemption provision, are otherwise exempted, but only to the extent that the exemption applies.

CONCLUSION

Therefore, it is the opinion of this office that the failure of a department to make such reports as are required by law would not relieve the State Purchasing Agent from his duty of maintaining a current inventory of removable property owned by the State.

We are further of the opinion that the duty to maintain such inventory does not extend to removable property purchased by those departments not subject to the State Purchasing Agent's Act, and obtained under such exemption.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Donal D. Guffey.

Very truly yours,

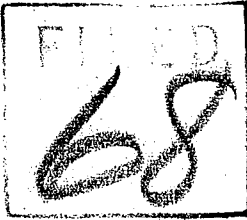
John M. Dalton
Attorney General

DDG/ld

enc. (1)

REFUSE DISPOSAL AREA:
JUNK DEALERS:
SALVAGE YARDS:
LICENSE:

A junk dealer who operates a salvage or junk yard would not be obliged to procure a license to operate a refuse disposal area, and a dealer who operated a used-car salvage supply lot will not be obliged to procure a license to operate a refuse disposal area.



January 20, 1956

Honorable W. H. S. O'Brien
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

Dear Sir:

I am in receipt of your recent request for an official opinion based upon the following questions addressed to you by the Clerk of the County Court of your county:

"1. Will a junk dealer who operates a salvage or junk yard be obligated to procure a license to operate a refuse disposal area.

"2. Will a dealer who operates a used car salvage supply lot be obligated to procure a license to operate a refuse disposal area."

You have informed us orally that the situation is that a person, who we will call "Jones," has a license to operate a junk yard, the question is whether, since the passage of the County Option Dumping Ground Law, Jones must have, in addition to his license to operate a junk yard, a license under the above new law to operate a disposal area, or perhaps simply a license to operate a disposal area and not a license to operate a junk yard, although he will in fact continue to operate only a junk yard.

We do not believe that the operator of a junk yard needs to have a license to operate a disposal area and we do not believe that he could operate a junk yard on a license to operate a disposal area only. To hold that he did require a disposal area license would be to hold that junk yard was a disposal area, which it clearly is not.

Section 64.460 of the disposal area laws reads:

"Definitions.-- As used in sections 64.460 to 64.487, the following terms mean:

"(1) 'Ashes', the residue from the burning of wood, coal, coke, or other combustible materials;

"(2) 'Garbage', putrescible animal and vegetable wastes resulting from the handling, preparation,

Honorable W. H. S. O'Brien

cooking, and consumption of food;

"(3) 'Refuse', all putrescible and nonputrescible solid wastes (except body wastes) including garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and solid market and industrial wastes;

"(4) 'Rubbish', nonputrescible solid wastes, excluding ashes, consisting of both combustible and noncombustible wastes, such as paper, cardboard, tin cans, yard clippings, wood, glass, bedding, crockery, and similar materials."

Section 64.463 reads:

"Dumping in unlicensed areas prohibited.-- No person shall dispose of any ashes, garbage, rubbish or refuse at any place except a disposal area licensed as provided in sections 64.460 to 64.487."

Section 64.467 reads:

"Application for dumping ground, fee.-- 1. Any person desiring a license to operate a disposal area shall make application therefor to the county court on forms provided by it.

"The application shall contain the name and residence of the applicant, the location of the proposed disposal area, and such other information as may be necessary. The application shall be accompanied by a fee of twenty-five dollars."

Following sections prescribe that the area selected shall be inspected and approved by the State Division of Health; that the county court may, under certain circumstances, revoke the license; that the Division of Health shall promulgate rules and regulations governing the operations of a disposal area; certain exceptions to the law; that the law shall not become operative in any county until the county court so orders; and finally a section making violation of the law a misdemeanor.

It will be noted that this is a new law; that its administration is solely under the jurisdiction of the county court, and, to some extent, of the State Division of Health. Since this is a new law it

Honorable W. H. S. O'Brien

is obvious that the legislature did not feel that any existing law, such as the law relating to junk yards or used-car salvage yards, did what the new law was intended to do.

Let us now look at this latter law. Paragraph 17 of Section 73.110 RSMo 1949, gives a city of the first class power to "license, tax and regulate * * * junk dealers * * *."

Paragraph 2 of Section 74.127 does the same for cities of the first class with an alternative form of government.

Paragraph 18 of Section 75.110 does the same for cities of the second class.

Section 94.360 does the same for special charter cities, and Section 94.110 does the same for third class cities. Other sections prohibit a junk dealer from dealing with a minor except under certain circumstances.

The only point where the county option dumping ground law and the law relating to junk yards and auto wrecking yards touches, is that the former, under one of its four headings in enumerating items included under that head lists "abandoned automobiles." It must be obvious that the "county option dumping ground law," and the laws relating to junk yards and automobile wrecking yards are wholly different things; that they are intended for different purposes; that the administration is different, and that these two types of yards are put to different uses.

CONCLUSION

It is the opinion of this department that a junk dealer who operates a salvage or junk yard would not be obliged to procure a license to operate a refuse disposal area, and that a dealer who operated a used-car salvage supply lot will not be obliged to procure a license to operate a refuse disposal area.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

HPW/ld

SURVEYORS:



A person who is not registered with the state board of registration for architects and professional engineers as a land surveyor may not lawfully practice, advertise or indicate to the public that he is engaged, or will engage, in land surveying; such a person may offer for recordation any papers relating to land surveying prepared by him prior to the effective date of the act; a paper prepared, signed and sealed by a person registered as a "registered professional engineer" may not be accepted for recordation, unless such person is an employee of the state.

May 31, 1956

Honorable W. H. S. O'Brien
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"I am requested by Mr. Richard M. King, Recorder within and for Jefferson County, State of Missouri to request of your office an opinion concerning the following:

"Mr. King poses three specific questions all of which arise by reason of Chapter 344 Revised Statutes of Missouri 1949 entitled Land Surveyors (New).

"1. The instant statute became effective as of August 29, 1955, but persons eligible were given one year next following the effective date to qualify (Section 344.050); Section 344.120 prohibits the Recorder of Deeds and other governmental officials to file or record any map, plat, survey or other documents which does not have impressed thereon the seal and signature of the registered land surveyor. Query, how can Section 344.050 and 344.120 be rationalized; in other words may the recorder of Deeds except plats, and similar instruments without the prescribed seal and signature during the pendency of the one year grace period?

"2. Suppose, by hypothesis that a plat was prepared prior to August 29, 1955 but not presented for recordation until after said date, but within one year thereafter. Query, can the recorder of deeds record same?

Honorable W. H. S. O'Brien

"3. Assume a plat is prepared, seal and signed by a person registered as a "Registered Professional Engineer". Query, does such person necessarily have to be registered as a land surveyor?"

All statutory references are to RSMo Cum. Supp. 1955.

Section 344.020 RSMo Cum. Supp. 1955, prohibits a person from acting as a land surveyor who has not registered with the state board of registration for architects and professional engineers as a land surveyor.

Section 344.020 RSMo Cum. Supp. 1955, sets forth the qualifications for registration.

Section 344.050 reads:

"Any person who within one year next following the effective date of this chapter, shall show to the professional engineering division of the state board of registration for architects and professional engineers that within the time, he was a duly qualified and acting county surveyor, shall be eligible for registration as a land surveyor, without examination, and without delay, and shall be so registered by the board on the certificate of the division showing that he has complied with the provisions of this section. This section shall expire and be of no effect on and after one year next following the effective date of this chapter."

Section 344.120 reads:

"It shall be unlawful for the recorder of deeds of any county, or the clerk of any city or town, or the clerk or other proper officer of any school, road, drainage, or levee district, or other civil subdivision of this state, to file or record any map, plat, survey, or other document prepared by any land surveyor, which does not have impressed thereon, and affixed thereto, the personal seal and signature of the registered land surveyor by whom, or under whose authority and direction, the map, plat, survey, or other document was prepared."

Section 344.110 reads:

"Every registered land surveyor shall procure a personal seal, in form approved by the professional engineering division of the board, and shall

Honorable W. H. S. O'Brien

affix the seal, and his signature upon all maps, plats, surveys, or other documents, before the delivery thereof to any client, or before offering to file or record any such map, plat, survey, or other document, in the office of the recorder of deeds of any county, or in the office of the city clerk of any city or town, or with the clerk or other proper officer of any school, road, drainage, or levee district, or other civil sub-division of this state."

We do not believe that Section 344.050 constitutes an exception to the law plainly set forth in Sections 344.110 and 344.120, the first of which is that a surveyor is forbidden under penalty of law from offering for registration papers prepared for him unless he is registered, as is set forth in Section 344.020, supra, and the second of which prohibits under penalty of law any recorder from receiving and recording papers, which do not have impressed upon them the matters set forth in Section 344.120, showing that the offeror is a land surveyor within the meaning of Section 344.020, supra.

We believe that Section 344.050 is merely a "grace" which enables the surveyor to become registered without an examination. We do not believe that during this period he may lawfully offer for recordation any papers prepared by him.

In answer to your second question, it is to be noted that Section 344.120 prohibits the recordation of documents prepared by any "land surveyor" which does not meet certain qualifications. Inasmuch as this is a new law and there was no definition of "land surveyor" prior to the effective date of this law, it seems clear that persons who legally prepared a document before the effective date of this law would not come within the prohibition against recording the document of a "land surveyor", and that the document so prepared would be eligible for recordation at the present time. To hold otherwise would violate the constitutional provisions prohibiting the enactment of laws retrospective in their operation.

In answer to your third question, we believe that a plat prepared by a person registered as a "registered professional engineer" should not be offered or accepted since Section 344.020 clearly states that before a person practices land surveying in the state he must be registered as a "land surveyor", unless such person is an employee of the state. On May 22, 1956, this office rendered an opinion, a copy of which is enclosed, to Robert L. Hyder, General Counsel, State Highway Department, which opinion so holds.

Honorable W. H. S. O'Brien

CONCLUSION

It is the opinion of this department that a person who is not registered with the state board of registration for architects and professional engineers as a land surveyor may not lawfully practice, advertise or indicate to the public that he is engaged in, or will engage in, land surveying; that such a person may offer for recordation any paper relating to land surveying prepared by him prior to the effective date of the act; that a paper prepared, signed and sealed by a person registered as a "Registered Professional Engineer" may not be accepted for recordation, unless such person is an employee of the state.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh F. Williamson.

Very truly yours,

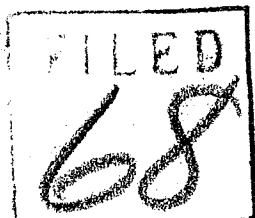
John M. Dalton
Attorney General

HPW/ld

enc. (1)

ELECTIONS:
COUNTY CLERK:

The county clerk in canvassing returns of an election cannot go behind the return unless, upon a comparison of the poll books and tally sheets, there is found a discrepancy, then he shall issue a certificate of election to the candidate receiving the highest number of votes as shown by the tally sheets.



November 28, 1956

Honorable Max Oliver
Prosecuting Attorney
Montgomery County
Montgomery City, Missouri

Dear Mr. Oliver:

This will acknowledge receipt of your request for an opinion which reads:

"Last Friday I requested your opinion concerning the proper procedure in case the canvassers ascertained from a comparison of the poll book with the tally sheets that the candidates for a particular office received more votes between them than the poll books showed said precinct to have voters casting their votes at said election.

"Would you give your opinion in writing on this question."

It is our understanding that you are only interested in knowing what is the proper action for the county clerk to take in this instance.

Section 111.710, Mo.RS 1949, provides that the county clerk and two others selected by said clerk, one from each political party, shall examine and cast up votes given each candidate and then give those having the highest number of votes certificates of election.

Section 111.720, RSMo 1949, provides that when judges of election in casting up the total votes cast shall make an error in giving to any county candidate for nomination or election a greater or less number of votes than he actually received as shown by the tally sheets of such precinct, the county clerk shall, in certifying to the nomination or election, be governed by the votes cast as shown

Honorable Max Oliver

by the tally sheets.

Section 111.620, MoRS 1949, provides how number or numbers on each ballot shall be covered by a sticker before being placed in the ballot box so as to conceal the number or numbers on said ballot. That no such sticker shall be removed except in case of contested elections, grand jury investigations or trial of civil or criminal cases in which violation of laws relating to elections may be in issue.

Section 111.630, MoRS 1949, further provides that said number must be covered in the manner hereinabove provided, and further provides the ballot shall be sealed in a package and delivered to the county clerk who shall deposit them in his office and safely preserve them for twelve months. That he shall not allow them to be inspected unless in case of a contested election or it becomes necessary to use them in the evidence in certain specified instances.

Volume 29, C.J.S., Sec. 237, pages 340 and 344, lays down the established and general rule as to powers of canvassers and reads:

"It is a common error for a canvassing board to overestimate its powers, but, since such a board is ordinarily a creation of constitution or statute, it may be stated generally that it has such powers and duties, and only such, as are conferred by the constitution or statute creating it, notwithstanding their exercise of certain judicial or discretionary powers, the powers and duties of the members of a board of canvassers are primarily ministerial in nature, being limited generally to the mechanical or mathematical function of ascertaining and declaring the apparent result of the election by adding or compiling the votes cast for each candidate as shown on the face of the returns before them, and then declaring or certifying the result so ascertained. Unless authorized by constitutional or statutory provisions, they have no power to go behind the returns and ascertain the qualifications of the voters or otherwise inquire into the regularity of the election.

* * *

"It is settled beyond controversy that canvassers cannot go behind the returns. The returns provided for by law are the sole and exclusive evidence from which a canvassing board or official can ascertain and declare the result. The canvassers are not authorized to examine or consider papers or documents which are transmitted to them with the

Honorable Max Oliver

returns, or as returns, but which under the statutes do not constitute part of the returns; neither are they at liberty to receive and consider extrinsic evidence, except perhaps where the returns have been destroyed or are otherwise unavailable, or where the testimony of the election officers is necessary to correct or complete conflicting and incomplete returns. Where there has been an alteration of the returns after they have been sent in, it is the duty of the canvassers to disregard the alteration and make the count according to the true returns."

In State ex rel. Ford vs. Trigg, 72 Mo. 365, an application for mandamus was filed to compel a county clerk to certify to the Secretary of State the vote cast for representatives of Congress in two precincts as same was certified by the judges and clerks of said election precincts. The county clerk contended that by comparison of the poll books and tally sheets filed it was apparent a mistake had been made in adding up the votes cast in said precincts.

The court held if judges and clerks of elections had made mistakes it could only be corrected by the tribunal authorized to determine contested elections and the court issued the peremptory writ. In so holding the court said, l.c. 366 and 367:

"From the foregoing facts stated by the respondent it is manifest that he has mistaken his duty and exceeded his authority. That he acted in good faith, we have no question. It was simply his duty, however, under the law, to certify to the Secretary of State the vote as it was certified to him by the judges and clerks of election. This has been the uniform rule in this State since the decision of this court in Mayo v. Freeland, 10 Mo. 629. If the judges and clerks have made mistakes in casting up the votes, the error can only be corrected by the tribunal authorized to determine contested elections. Mayo v. Freeland, supra. Tally sheets are unknown to the law. They are convenient, perhaps necessary for the judges and clerks of election, in casting up the votes polled for the several candidates, but they are not required to be made, preserved or filed, and if they were, the respondent would have had no right, as the law now stands, to refer to them for the purpose of verifying or correcting the certificates of the judges and clerks. Peremptory writ awarded. All the judges concur."

Honorable Max Oliver

At the time the foregoing decision was rendered there was no law similar to Section 111.720, supra, as that law was first enacted during the 48th General Assembly (See Session Laws 1915, page 282, Sec. 4882 RSMo 1919).

This accounts for the decision holding that no alteration could be made by the county clerk when a discrepancy is found between the tally sheet and the poll book.

Your request is not very clear as to what the return actually shows, whether it gives a candidate more or less votes than shown by the tally sheets. In view of the provisions of Section 111.720, supra, regardless of what the case may be, the county clerk shall issue his certificate of election based upon the total votes shown cast by said tally sheets.

In State ex rel. Garesche, 3 Mo. App. 526, l.c. 535, 536, 537, the Court of Appeals likewise held that a county clerk in canvassing a vote cannot go behind the returns and reads:

"The clerk certainly cannot inquire into, and has nothing whatever to do with, any errors that occur before the poll-book reaches his office. He cannot conduct a contested election in any case. He is bound to presume in favor of the integrity of the return at the time that he canvasses the vote, and cannot certify to anything but the face of the return, unless he knows it has been changed.
* * * *"

* * * * *

"Undoubtedly; but he must know what the returns are before he can cast them up; and to this extent he must have discretion. He cannot go behind the returns, but he must know what are the returns that came to his office. He has nothing to do with fraudulent votes, nor with changes in the books before they are left with him; but between two books, both claiming to be the poll-books left in his custody, he must decide, if such a question arise. He cannot count as a return what he knows not to be a return, nor count as a figure what he knows to be no part of the return made to his office, but something that has been put

Honorable Max Oliver

in its place since the books came there."

The county clerk in canvassing such returns is performing merely a ministerial function, as was held in State ex rel. Hammerstein vs. Williams, 95 Mo. 159, l.c. 162, wherein the court said:

"It needs no citation of authorities to establish the proposition that the duty of respondents in canvassing the returns of said election are purely ministerial and that words readily distinguishable in sound are not idem sonans; * * * *"

In State vs. Osburn, 147 S.W.(2d) l.c. 1068, 1069, the Supreme Court likewise held that the duty of canvassers is purely ministerial and that canvassers have no right to go behind the return. In so holding the court said:

"The duties enjoined upon the speaker place him in the same category as a mere canvassing officer or canvassing board. By the overwhelming weight of authority throughout the country the function and duties of canvassers are purely ministerial. 20 C.J. Sec. 254, 18 Am. Jur. Sec. 254. This state follows the weight of authority. The rule here adopted is that the duty of casting up the vote certified by the returns and ascertaining who received the highest vote is a purely ministerial duty, and being such the canvassers have no right to go behind the returns. Mayo v. Freeland, 10 Mo. 629; State ex rel. Attorney General v. Steers, 40 Mo. 223; State ex rel. Metcalf v. Garesche, 65 Mo. 480; State ex rel. Ford v. Trigg, 72 Mo. 365; State ex rel. Broadhead v. Berg, 76 Mo. 136; Barns v. Gottschalk, 3 Mo. App. 111; State ex rel. v. Stuckey, 78 Mo. App. 533; State ex rel. Glenn v. Smith, 129 Mo. App. 49, 107 S.W. 1051; State ex inf. Anderson v. Moss, 187 Mo. App. 151, 172 S.W. 1180. We see no reason why this is not also true of the canvass which the speaker is required to make by Section 3."

In view of the statutes and decisions it appears that the county clerk, in canvassing returns of an election, is acting as a ministerial officer and is vested with no authority but to issue his certificate as shown by the returns delivered to him by the

Honorable Max Oliver

clerk and judges of the election, the only exception being as provided in Section 111.720, supra. This is particularly true in view of the fact that the law clearly specifies in what instances the stickers on said ballots may be removed from said ballots and certainly this does not present any such problem.

CONCLUSION

Therefore, under the present law, it is the opinion of this department, in this instance, the county clerk shall examine and cast up said votes for the respective candidates and if upon comparison of the poll books and tally sheets there is found a discrepancy then he should give the candidate receiving the highest number of votes as shown by said tally sheets, a certificate of election.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Aubrey R. Hammett, Jr.

Very truly yours,

John M. Dalton
Attorney General

PUBLIC RECORDS: Assessment lists in custody of county court may be
PROBATE COURT: destroyed when in compliance with provisions of Section
COUNTY COURT: 109.150, MoRS Cum. Supp. 1955. School enumeration
lists cannot be destroyed and only the vouchers and
receipts in any estate filed in probate court may be
destroyed and then only in compliance with the
provisions of Section 472.280, Subsection 2, MoRS Cum.
Supp. 1955.

May 25, 1956



Honorable James L. Paul
Prosecuting Attorney
Pineville, Missouri

Dear Mr. Paul:

This will acknowledge receipt of your request for an opinion
which reads:

"The vault in our court house is becoming
extremely crowded and there is urgent need
to destroy any of the old records which we
are permitted to do in order to make additional
room space available.

"Kindly advise me how far back the Circuit Clerk
must keep the assessment list; if the school
enumeration list must be kept intact; do probate
files covering administration of estates prior
to 1940 need to be kept and what other similar
records may be destroyed."

The law appears to be well established that public records
required by statute to be made, may only be destroyed when the
statute clearly provides that such may be done.

In Molineux vs. Collins, 177 N.Y. 395, 69 N.E. 727, the court in
holding certain records could only be destroyed when the Legislature
so provided by statute said at l.c. 398:

"The measurements and record, therefore, were made
by authority of law and became the property of the
state, which paid 'the necessary expenses incurred'
for the purpose. (L. 1896, ch. 440 §2) They were
public records and were beyond the control of the

Honorable James L. Paul

superintendent of prisons, except for preservation and use. He had no power to destroy them or give them away, or surrender them even to one who, although under judgment of death when they were made, was finally adjudged not guilty. The custodian of a public record cannot deface it or give it up, without authority from the same source which required it to be made. The statute directed the superintendent to make the record, and when he made it the state made it, and it has not authorized him to destroy it under any circumstances, not even to relieve a citizen from an unjust reflection upon his character. * * * *

Section 12, Volume 45, Am. Jur. page 425, lays down the general rule as to when public records may be destroyed, and reads, in part:

"Public records and documents are the property of the state and not of the individual who happens at the moment, to have them in his possession; and when they are deposited in the place designated for them by law, there they must remain, and can be removed only under authority of an act of the legislature and in the manner and for the purpose designated by law. The custodian of a public record cannot destroy it, deface it, or give it up without authority from the same source which required it to be made. * * * *"

You first inquire as to how far back the circuit clerk must keep the assessment lists. We assume you mean tax assessment lists and if we are correct in our assumption then we find no statutory requirement for the circuit clerk even having or keeping such assessment lists. Apparently you had in mind the county clerk keeping such records, at any rate we will, for the sake of this opinion, assume the latter to be the case.

Under Section 137.155, MoRS 1949, it requires the county clerk in such county as yours to preserve and safely keep assessment lists and reads, in part:

"* * * *"

"3. The list and oath required by this section shall be by the assessor, after he has completed his assessor's books, filed in the office of the

Honorable James L. Paul

county clerk, and by him, after entering the filing of the same thereon, be preserved and safely kept."

Under Section 109.150, MoRS Cum. Supp. 1955, the Legislature authorized the county court to direct the sheriff to destroy by burning, during the session of the county court and in the presence of said county court, papers therein designated after said papers have been filed for a period of five years. Said section reads:

"The county courts are hereby authorized to direct the sheriff of their respective counties to destroy, by burning, during the session of and in the presence of the county court, the papers herein designated, after a period of five years after the filing thereof; Assessment lists, merchants' and manufacturers' statements, school estimates, poll books, annual settlements and bonds of road overseers, canceled county warrants, settlements of county treasurer, settlements of superintendent of poor farm, canceled school district warrants, estray papers, appointments of deputies, reports and receipts of the collectors of the revenue, certificates of fines, statements of campaign expenses, quarterly statements of fees received by county officers, settlements of village school district treasurers, road overseers' reports, road commissioners' reports, and bills allowed against the county."

The first item that said statute authorizes destroyed is assessment lists. Therefore, our answer to your first inquiry would be that assessment lists could be destroyed when in compliance with the provisions of Section 109.150, supra, after same had been on file for a period of five years.

Section 164.030 MoRS Cum. Supp. 1955, provides that school enumeration lists shall be turned over to the county clerk after the county superintendent of schools ascertains that said lists are properly made. Said Section reads, in part, as follows:

"* * * * *

"2. After ascertaining if said enumeration lists are properly made the county superintendent of schools shall approve same and turn them over to the county clerk. * * * * *"

Honorable James L. Paul

Therefore, under the foregoing authorities, in the absence of any statutory authority for destroying such records, it is the opinion of this department that enumeration lists may not be destroyed.

You next inquire if probate files covering administration of estates prior to 1940 need be kept?

The only statute we can locate authorizing the destruction of records in the probate court is found under Section 472.280, MoRS Cum. Supp. 1955, Subsection 2, which provides that all vouchers and receipts in any estate filed in the probate court may be destroyed on order of the probate court after same had been on file for a period of five years after final determination of the administration of the estate. Said section reads, in part:

" * * * * *

"2. All vouchers and receipts in any estate filed in the court may be destroyed on order of the court after they have been on file for a period of five years after final termination of administration proceedings in the estate."

In the absence of any further statutory authority for destruction of probate court files, it is the opinion of this department that only the vouchers and receipts in such estate may be destroyed as provided in the foregoing statute.

You further inquire what other similar records may be destroyed. This is very general and rather difficult to answer. However, we respectfully suggest that several different kinds of records may be destroyed under and by virtue of Section 109.050, supra.

CONCLUSION

It is the opinion of this department that assessment lists kept by the county clerk may be destroyed when the county court directs the sheriff to destroy same by burning, during a session of the county court and in the presence of said court and after same had been on file for a period of five years as provided under Section 109.050, MoRS Cum. Supp. 1955.

It is the further opinion that the school enumeration lists required to be kept by the county clerk under Section 164.030, MoRS

Honorable James L. Paul

Cum. Supp. 1955, may not be destroyed in the absence of any statutory authority for destruction of same.

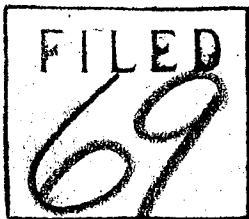
It is the further opinion of this department that only vouchers and receipts in any estate filed in the probate court may be destroyed and then only on order of the probate court after same had been on file for a period of five years after final determination of the administration of the estate as provided in Section 472.280, Subsection 2, MoRS Cum. Supp. 1955.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

John M. Dalton
Attorney General

MISSOURI STATE PARK BOARD: Missouri State Park Board unauthorized to
TITLE: acquire right of way easement from Highway
REAL ESTATE: 66 to Meramec State Park.



June 25, 1956

Missouri State Park Board
Jefferson Building
Jefferson City, Missouri

Attention: Mr. Joseph Jaeger, Jr.
Director of Parks.

Gentlemen:

This will acknowledge receipt of your request for an opinion
which reads:

"I should like to obtain from you a legal
opinion as to a certain procedure in land
purchase to determine whether or not the
Missouri State Park Board is within its
legal authority to do so.

"The situation is at Meramec State Park
whereby we would like to obtain a right of
way for a new highway entrance off of U.S.
66. The question is, are we within our
legal power to do so under the method of
appropriations for the Missouri State Park
Board."

In rendering this opinion we shall first determine if the
Missouri State Park Board can acquire such a right of way. If it
may legally acquire such right of way then it will be necessary to
determine if there is sufficient appropriation. However, if it
cannot do this then the request as to the sufficiency of the
appropriation will not require our consideration at least for the
time being.

The authority of the Missouri State Park Board to acquire land
is found under Section 253.040, MoRS Cum. Supp. 1955, which reads:

Missouri State Park Board

"1. The board is hereby authorized to accept or acquire by purchase, lease, donation, agreement or eminent domain, any lands, or rights in lands, sites, objects or facilities which in its opinion should be held, preserved, improved and maintained for park or parkway purposes. The board is authorized to improve, maintain, operate and regulate any such lands, sites, object or facilities when such action would promote the park program and the general welfare. The board is further authorized to accept gifts, bequests or contributions of money or other real or personal property to be expended for any of the purposes of this chapter; except that any contributions of money to the state park board shall be deposited with the state treasurer to the credit of the state park fund and expended upon authorization of the state park board for the purposes of this chapter and for no other purposes.

"2. In the event the right of eminent domain be exercised, it shall be exercised in the same manner as now or hereafter provided for the exercise of eminent domain by the state highway commission."

The question boils down to whether or not said Board by acquiring said right of way is doing so for the purpose of holding, preserving, improving and maintaining it for park or parkway purpose.

Under Section 253.010, MoRS Cum. Supp. 1955, we find the following definitions of words used in Chapter 253:

"(1) 'Land,' upland, land under water, the water itself and every estate, interest and right, legal or equitable in land or water;

"(2) 'Park,' any land, site or object primarily of recreational value or of cultural value because of its scenic, historic, prehistoric, archeologic, scientific, or other distinctive characteristics or natural features;

"(3) 'Parkway,' an elongated area of park land, usually contiguous to a pleasure driveway and often containing recreational areas.

Missouri State Park Board

"(4) 'Board,' The Missouri State Park Board created by this chapter."

It is difficult to conceive how the acquiring of a right of way from Highway 66 to Meramec State Park, to be used only for the purpose of ingress and egress from the State Park to said Highway, could be construed as holding, preserving and improving same for park, or parkway purposes, as park and parkway are hereinabove defined.

Section 27, Article I, Constitution of Missouri, authorizes the state to acquire by eminent domain such property or rights in property in excess of that actually occupied by the public improvement or used in connection therewith as may be reasonably necessary to effectuate the purposes intended. However, this so-called excess property, to which you refer in said amendment, can only be acquired in such manner and under such limitations as may be provided by law. We are not able to find any statutory authorization for acquiring land for a right of way from Highway 66 to said Meramec State Park.

There are several rules of construction that might be applicable in construing the Missouri State Park Board Act. First, a primary rule of statutory construction is to ascertain the lawmakers' intent from the words used, if possible, and then give the language used its plain and rational meaning and promote its objects. *Laclede Gas Co. Vs. City of St. Louis*, 253 S.W.(2d) 832, 363 Mo. 842.

Another well established rule of construction is that a statutory grant of power carries with it necessary implied power to render effective that power expressly granted and that which is implied in a statute is as much a part of it as what is expressed. *State ex rel. Ferguson vs. Donnell*, 163 S.W.(2d) 940, 349 Mo. 975. However, we are of the opinion the foregoing rule on implied power is not applicable in this instance for the reason that Chapter 253 MoRS Cum. Supp. 1955, requires no implied power to carry out those express powers granted therein. Furthermore, it would have been an easy matter for the General Assembly to have clearly included such authority under Chapter 253 had it so desired the Board to have that authority. Since this was not done this department cannot read it into the law. As stated in *Jack Frost Abattoirs, Inc. vs. Steinbach*, 274 S.W.(2d) 588, courts may not change the meaning of a plain and unambiguous statute.

Under the new Missouri State Park Board Act and the foregoing rules of statutory construction, it is apparent that the Legislature never intended to vest any authority in the Missouri State Park Board

Missouri State Park Board

to acquire land for such right of way which is located outside of a Missouri state park.

CONCLUSION

Therefore, it is the opinion of this department that the Missouri State Park Board has no authority to acquire such land for a right of way from Meramec State Park to Highway 66. Furthermore in view of the foregoing conclusion we deem it unnecessary to pass upon the sufficiency of your appropriation for acquiring such land.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

John M. Dalton
Attorney General

TAX SALE:
LAND SOLD FOR TAXES:
REDEEM - WHO MAY?

Owner may redeem land sold for taxes. Occupant or person may redeem, if transfer may affect their rights; and agent of record owner may redeem if he has authority to redeem. Stranger to land cannot redeem.



September 24, 1956

Honorable James L. Paul
Prosecuting Attorney
McDonald County
Pineville, Missouri

Dear Mr. Paul:

This is in answer to your request for an official opinion from this office involving Section 140.340, RSMo 1949. Your request reads as follows:

"There has been a question arise in this county relative to redemption of land sold for taxes between the date of the tax sale and the execution and delivery of the collector's deed. Please furnish me an opinion covering the following facts:

"A was the owner of real estate and is still the record owner thereof. A left this county some eight or ten years ago and his whereabouts are unknown. At the August tax sale in 1955, B bid the highest bid for A's land and received a certificate of purchase therefor. In July, 1956 C, an adjoining owner to A's land tendered to the County Collector the full amount of the bid plus the accrued interest and the 1955 taxes and demanded a redemption certificate in the name of A.

"The known facts are that C tendered this for his own personal gain as he desires to use the land for his own benefit. B claims he has no right to the certificate of redemption for the reason he has no authority from A to redeem."

Section 140.340, RSMo 1949, reads as follows:

"1. The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the two years next ensuing, in the following manner: By paying to the county collector, for the use of the purchaser, his heirs or assigns, the full sum of the purchase money named in his certificate of purchase

Honorable James L. Paul

and all the cost of the sale together with interest at the rate specified in such certificate, not to exceed ten per cent annually, with all subsequent taxes which have been paid thereon by the purchaser, his heirs or assigns, with interest at the rate of eight per cent per annum on such taxes subsequently paid, and in addition thereto the person redeeming any land shall pay the costs incident to entry of recital of such redemption.

"2. Upon deposit with the county collector of the amount necessary to redeem as herein provided, it shall be the duty of the county collector to mail to the purchaser, his heirs or assigns, at the last post office address if known, and if not known, then to the address of the purchaser as shown in the record of the certificate of purchase, notice of such deposit for redemption.

"3. Such notice, given as herein provided, shall stop payment to the purchaser, his heirs, or assigns, of any further interest or penalty.

"4. In case the party purchasing said land, his heirs or assigns, fails to take a tax deed for the land so purchased within six months after the expiration of the two years next following the date of sale, no interest shall be charged or collected from the redemptioner after that time."

It is clear that this section authorizes the owner of any land or lot sold for taxes to redeem said land or lot. The statute also authorizes "the occupant * * *", or "any other persons having an interest therein" to redeem any land or lot sold for taxes. This latter phrase in the statute has caused some trouble, and Missouri cases have had to interpret it. "This undoubtedly means an occupant having some interest therein, whose rights might be affected by transfer of ownership." *Davis v. Johnson*, 357 Mo. 417, 208 S.W. 2d 266, 268.

If a person wanted to redeem land sold for taxes, "* * * it was not necessary for him to be vested with the legal title to entitle him to redeem." *State ex rel. v. Short*, 351 Mo. 1013, 174 S.W. 2d 821, 822. In *Davis v. Johnson*, supra, at page 268 [1,2], the court said that, "It might include a lessee," and that it would include a person who claimed title by adverse possession. The purchaser of a note and trust deed securing it had a sufficient interest

Honorable James L. Paul

to redeem. State ex rel. v. King, 354 Mo. 501, 189 S.W. 2d 981, 982.

Thus, it appears from the above cases that a person, if he is not the owner of the land sought to be redeemed, must have a sufficient interest in the land to enable him to redeem it from a tax sale. From your letter, it does not appear whether "C" is such a person. If he is not, he would not be entitled to redeem the land, as he would not be a person having an interest therein.

Your letter states that "C" demanded a redemption certificate "in the name of 'A'", the record owner of the land. If "C" wants a redemption certificate in the name of "A", it would appear as if he is acting as an agent for "A" in this matter. Perhaps he is acting solely for his own personal gain, and has no interest in the land. If so, he would appear to be a stranger to the land.

Whether a stranger to the land or an agent may redeem, has not been decided in Missouri. Other jurisdictions, however, have held that an agent may redeem land from a tax sale, if he has the authority to do so. In People ex rel. Marsh v. Campbell, 143 N.Y. 335, 38 N.E. 300, New York had a statute very similar to ours, supra. Application was made to the comptroller to redeem, and it was signed, "P. J. Marsh, Agt." The court said at page 300, "The application does not disclose that Marsh had any interest in the premises sought to be redeemed, nor does the record show the meaning of the word 'Agt.' after the signature of the relator to the application to redeem." The court denied the agent the right to redeem.

In a West Virginia case, Townshend v. Shaffer, 3 S.E. 586, the issue was whether the agent who sought to redeem had the authority to do so. The court held the agent had the authority to redeem the land, since he was appointed attorney for the plaintiffs and was expressly authorized to protect all their interests in the title to the land. The court said at page 588, "It seems to me, therefore, that the powers of attorney were clearly sufficient to authorize Martin [the agent] to redeem the land."

Using the above as authority, "C" does not have the right to redeem the land unless he has authority from "A" to do so.

Also, if "C" is a stranger to the land, he would not be entitled to redeem. In Bloomfield Heights v. Holland Associates, 22 N. J. Misc. 61, 35 A. 2d 622, a person sought to redeem where New Jersey had a statute very similar to ours, supra. At page 627 the court held, "The defendant Cohen was not a party to the foreclosure, but neither is he one of the persons referred to in the statute who had a right to redeem. Not having any interest in

Honorable James L. Paul

the property itself, he is therefore in the position of a stranger and has no right of redemption."

In Nebraska, the courts have not allowed strangers to the land the right to redeem land from a tax sale. In Coffin v. Maitland, 146 Neb. 477, 20 N.W. 2d 310, the court said where the grantors were strangers to the title, their quit claim deed to the grantee granted him no right, title or interest upon which he could base a right to redeem.

CONCLUSION

Therefore, it is the opinion of this office that Section 140.340, RSMo 1949, authorizes the owner of any land or lot sold for taxes to redeem said land; and any occupant or person having an interest therein, which might include a person claiming title by adverse possession, a lessee, or the purchaser of a note and trust deed securing it.

Also, an agent may redeem the land if he has the authority to do so; and a stranger to the land has no right to redeem land from a tax sale.

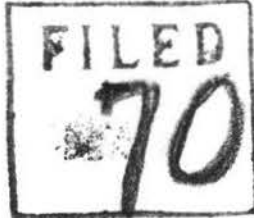
The foregoing opinion, which I hereby approve, was prepared by my Assistant, George E. Schaaf.

Very truly yours,

JOHN M. DALTON
Attorney General

GES/b1

TAXATION:
EXEMPTION OF HOUSE-
HOLD GOODS:



Sec. 137.120, RSMo 1949, providing that an assessment list shall contain a statement of each piano, other musical instruments, radios, clocks, watches, chains and appendages, sewing machines, washing machines, refrigerators, gold and silver plates, jewelry, household and kitchen furniture of person assessed, if repealed will not thereby exempt such personal property from taxation. All laws attempting to exempt such personal property from taxation not owned by this state, any county or other political subdivision or nonprofit cemeteries, and held for profit and is not used exclusively for religious worship, schools and colleges, for purely charitable or for agricultural and horticultural societies, are in violation of Art. X, Sec. 6, Const. of Mo., and such laws are void.

October 22, 1956

Honorable Robert Pentland
Senator, First District
1127 Pine Street
St. Louis, Missouri

Dear Sir:

This is to acknowledge receipt of your recent request for our legal opinion, which reads as follows:

"I would appreciate obtaining an opinion, as soon as possible, as to the legal steps necessary for the repeal of the household tax in the State of Missouri.

"There is some urgency in obtaining such an opinion, and I would be grateful for anything you can do to facilitate this matter."

Upon our request, you gave your explanation of the term "household tax" as used in the opinion request:

"The 'household tax' to which I refer is that portion of the personal property tax which deals with furniture, jewelry, etc.

"Section 137.120, subsection (4) under Property List-Contents, lists such items as are included in the household tax, as it is popularly called.

"The legal opinion which we desire is this: What steps would be necessary to repeal this subsection (4), so as to remove it from the taxable items.

Honorable Robert Pentland

"Must this be done through a referendum vote, or can it be repealed through an amendment offered on the floor of the State House or Senate?"

Subsection 4, Sec. 137.120, RSMo 1949, is referred to in your inquiry and said subsection is as follows:

"(4) A statement of household property, including the number of pianos and other musical instruments, radios, clocks, watches, chains and appendages, sewing machines, washing machines, refrigerators, gold and silver plates, jewelry, household and kitchen furniture and the value thereof."

Sec. 137.075, RSMo 1949, provides what property shall be liable to taxes and reads as follows:

"Every person owning or holding real property or tangible personal property on the first day of January including all such property purchased on that day, shall be liable for taxes thereon during the same calendar year."

Art. X, Sec. 6, Constitution of Missouri, 1945, exempts property from taxes under certain conditions and reads as follows:

"All property, real and personal, of the state, counties and other political subdivisions, and nonprofit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."

It is believed that if this subsection were repealed it would not have the effect of repealing a law making such tangible personal property liable for taxes, as the subsection does not make such property liable for taxes and only has reference to the contents of the tax assessment blank. Sec. 137.075, supra, is that portion of

the tax laws of Missouri which makes all real and tangible personal property liable for taxation, and as long as this section is in effect, tangible personal property of every owner of the kind described in subsection 4, Sec. 137.120, supra, is liable for taxation, except that property of certain owners, or when it is used exclusively for the purposes mentioned in Art. X, Sec. 6 of the Constitution, supra.

Section 137.100, RSMo 1949, implements the constitutional provisions and reads as follows:

"The following subjects shall be exempt from taxation for state, county or local purposes:

(1) Lands and other property belonging to this state;

(2) Lands and other property belonging to any city, county or other political subdivision in this state, including market houses, town halls and other public structures, with their furniture and equipments and on public squares and lots kept open for health, use or ornament;

(3) Lands or lots of ground granted by the United States or this state to any county, city or town, village or township, for the purpose of education, until disposed of to individuals by sale or lease;

(4) Nonprofit cemeteries;

(5) The real estate and tangible personal property which is used exclusively for agricultural or horticultural societies heretofore organized, or which may be hereafter organized in this state;

(6) All property, real and personal actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable, and not held for private or corporate profit shall be exempted from taxation for state, city, county, school, and local purposes; provided, however, that the exemption herein granted shall not include real property not actually

Honorable Robert Pentland

used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom be used wholly for religious, educational or charitable purposes."

In event Sec. 137.100, supra, were amended by the General Assembly to grant exemptions from tax liabilities on all tangible personal property named in subsection 4, Sec. 137.120, supra, when such property was not owned or used exclusively for the purposes mentioned in Art. X, Sec. 6 of the Constitution, such a law would be void and in violation of said constitutional provision which expressly provides:

" * * * All laws exempting from taxation property other than the property enumerated in this article, shall be void."

CONCLUSION

It is, therefore, the opinion of this department that subsection 4, Sec. 137.120, RSMo 1949, providing that an assessment list shall contain a statement of each piano, other musical instruments, radios, clocks, watches, chains and appendages, sewing machines, washing machines, refrigerators, gold and silver plates, jewelry, household and kitchen furniture (of the person assessed) if repealed will not have the effect of exempting the personal property named therein from taxes. Any laws attempting to exempt any such personal property from taxes, when not owned by the state, any county or other political subdivision or nonprofit cemeteries, which is not used exclusively for religious worship, schools and colleges, for purely charitable purposes, or for agricultural or horticultural societies, are in violation of Art. X, Sec. 6, Constitution of Missouri, and such laws are void.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Paul N. Chitwood.

Yours very truly,

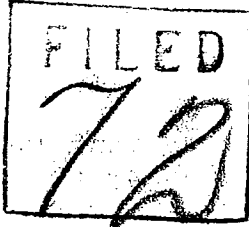
JOHN M. DALTON
Attorney General

PNC:hw;ml

COUNTY COLLECTOR:
COMPENSATION:
TAXATION:
COUNTIES:
COMMISSIONS:
COLLECTOR:
DRAINAGE DISTRICTS:

County collector of second class county charges commissions for collection of current taxes and drainage district taxes and pays such commissions to county treasury.

*Note: See exceptions, para 2, sec 50.350
RS no
1978*



April 11, 1956

Mr. Stephen R. Pratt
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Sir:

This is in answer to your letter of recent date, requesting an official opinion of this office, reading as follows:

"Our County became a second class county on January 1st of last year. Several questions have arisen regarding collection of taxes and we would like your official opinion relative to the following:

1. Section 52.420 R.S. 1949 provides that 'the annual salary therein specified to be paid to the collector shall be in lieu of all fees, commissions, penalties, charges and compensation...'

"Section 242.540 provides that the collector shall collect all drainage taxes for drainage districts organized in the county by authority of the Circuit Court, and 242.550 provides that he shall retain 1% of the amount collected on current taxes and 2% of the amount collected on delinquent taxes for his services.

"Does our class 2 collector continue to make such charges, and if so, does he remit the full amount thereof to the general revenue fund of the county?

2. Section 52.260 provides that the collector, except in counties where he is by law paid a salary in lieu of fees and other compensation, shall receive for his services in

Mr. Stephen R. Pratt

collecting current taxes certain commissions, and further provides that if the commissions so retained exceed the amount incurred by him for office expenses and allowed to him for salary, then such excess shall be prorated among and returned to the various governmental subdivisions for whom taxes were collected.

"Section 52.330, apparently applicable to St. Louis County only, provides that the Collector shall continue to collect such commissions and turn the same over to the County Treasurer. We have been unable to find any similar law applicable to our county. Does the Collector of Clay County continue to collect commissions for the collection of current taxes, and if so, is the amount thereof based upon the provisions of said Section 52.260?

3. If the answer to the last question is the affirmative, is the collector required to return to the various governmental agencies the excess of his commissions over the office expenses and salary, or does he pay the entire amount of the commissions collected to the County Treasurer for the benefit of the general revenue fund?"

In answer to your first question we are enclosing an official opinion of this office rendered under date of May 5, 1955, to William Harrison Norton.

Section 50.350 RSMo 1949, provides as follows:

"It shall be the duty of every county officer, in all counties of the second class, who shall be paid an annual salary in lieu of all fees, penalties, commissions, charges, emoluments, and moneys due him or his office for any service performed, to charge, collect and receive, upon behalf of the county, every fee, penalty, commission, charge, emolument and money that accrues in his office for any service rendered, by virtue of any statute of this state, except such fees as are chargeable to the county."

Under the provisions of such section the county collector of a county of the second class is directed to collect the statutory commissions on drainage district taxes and to pay them into the county treasury.

Mr. Stephen R. Pratt

Section 52.260, RSMo 1949, provides in part as follows:

"The collector, except in counties where the collector is by law paid a salary in lieu of fees and other compensation, shall receive as full compensation for his services in collecting the revenue, except back taxes, the following commissions and no more: * * *"

Such section authorizes the collection of the commissions found therein by county collectors in counties of the second class, but the compensation of such collectors is provided for by salary and such collectors are therefore not authorized to retain such commissions.

Under the provisions of Section 50.350, supra, such commissions are to be paid into the county treasury.

CONCLUSION

It is the opinion of this office that the commissions received by the county collector in a county of the second class for collection of drainage district taxes are to be paid into the county treasury.

It is further the opinion of this office that such collector is to collect the statutory commissions provided for collection of current taxes and to pay such commissions into the county treasury.

The foregoing opinion, which I hereby approve, was prepared by my assistant, C. B. Burns, Jr.

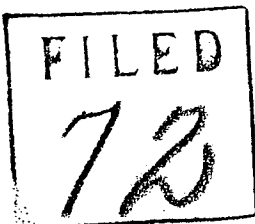
Very truly yours,

JOHN M. DALTON
Attorney General

CEB/ld/b1

STATE LIBRARIAN:
MAY HOLD STATE LIBRARY
MEETINGS AND DISTRICT
LIBRARY INSTITUTES:

State librarian authorized under provisions of
Section 181.030 RSMo 1949 to hold State library
meetings and district library institutes referred
to in Section 182.110 RSMo Cumulative Supplement
1955.



May 16, 1956

Honorable Paxton P. Price
State Librarian
State Office Building
Jefferson City, Missouri

Dear Mr. Price:

This department is in receipt of your recent request for
our official opinion, which reads as follows:

"Will you please give this office your
legal opinion on the application mean-
ing of Section 182.110, RSMo., 1955
Supplement.

"Does this section apply in application,
to meetings of county libraries called
by the State Library, and district library
institutes conducted by the State Library?"

From supplemental information received, we understand the
inquiry to be whether or not the State Librarian is authorized
under the provisions of Section 182.110 RSMo Cumulative Sup-
plement 1955 to hold State library meetings and district library
institutes.

Section 181.030 RSMo 1949, provides for the organization,
powers and duties of the State library. Said section reads as
follows:

"1. The state library shall be organized
into sections designated:

- (1) Public library and adult education
service;
- (2) School library service;
- (3) Institutional library service;
- (4) Public documents service.

Honorable Paxton P. Price

"2. It shall furnish library service to public and school libraries, institutions and state departments, and to all communities which may propose to establish libraries. It shall serve as a clearing house on library professional problems, and shall furnish information as to the best means of establishing and maintaining libraries, the selection of books, cataloging and other details of library management. It may receive gifts of money, books or other property which may be used or held in trust for the purpose or purposes given. It may purchase and operate libraries and circulate such libraries within the state among communities, schools, charitable and penal institutions and other organizations approved by the state librarian. Libraries may be furnished free of cost, under such conditions and rules as shall protect the interest of the state and best increase the efficiency of the service. It may publish lists and circulars of information as it shall deem necessary and it may also conduct schools of library instruction. It shall constitute the agency for receiving grants from the United States or under any act of congress for public libraries, school libraries, or other types of library services and may make any rule, regulation or condition in connection with such grants as may be necessary or required in the administration thereof."

Section 181.021 RSMo Cumulative Supplement 1955, provides that the State Library shall be under the control of the State library commission and gives the duties of the commission. Said section reads as follows:

"The Missouri state library shall be under the control of the state library commission and operated under rules and regulations promulgated by the commission. The commission shall:

(1) Direct the survey of services given by libraries which may be established or assisted under any law for state grants-in-aid to libraries;

Honorable Paxton P. Price

(2) Further the coordination of library services furnished by the state with those of local libraries and other educational agencies;

(3) Publish an annual report showing conditions and progress of public library service in Missouri;

(4) Furnish information and counsel as to the best means of establishing and maintaining libraries, the selection of books, cataloging and other details of library management; provide assistance in organizing libraries or improving service given by them and assist library services in state institutions;

(5) Receive and administer grants from the United States under any act of congress for public libraries, or other types of library service, and make rules and regulations in connection with such grants as may be necessary or required in the administration thereof;

(6) Receive gifts of money, books or other property which may be used or held in trust for the purposes given;

(7) Administer state grants-in-aid and encourage local support for the betterment of local library service and generally promote an effective state-wide public library system;

(8) Purchase library materials and circulate the material by all means necessary, including the use of bookmobiles, within the state among individuals, communities, libraries, schools, charitable and state institutions, state departments and other organizations approved by the state library commission."

Among the duties of the State library referred to in Section 181.030, supra, are those of providing library services for the communities, libraries, institutions and other organizations approved by the State Librarian. The State library is to serve as a clearing house on library professional problems. It shall also furnish information as to the best means of establishing and maintaining libraries, and of the management of the same. It may publish lists and circulars of information when deemed necessary,

Honorable Paxton P. Price

and may conduct schools of library instructions.

From the provisions of Section 181.021, supra, we note that the State library is under the control of the State Library Commission and is operated under rules and regulations promulgated by the commission. However, from a reading of various sections of Chapter 181 RSMo Cumulative Supplement 1945 including Sections 181.033, 181.043, 181.060 and 181.030 RSMo 1949, it appears that the administrative and procedural matters, the working out of details, and the accomplishment of the statutory purposes for which the State library was created, and also the duty of harmonizing and cooperating the services of county and other public libraries with the program of the State library, have been left to the State librarian.

With these statutory provisions in mind, which apparently indicate the legislative intent to be that the State librarian not only has the authority, but it is his duty to supervise and administer the State library's affairs in furnishing library services to the communities and libraries mentioned in Section 181.030, supra, to furnish communities and institutions of the State with proper information in establishing and maintaining public libraries, and also information in the form of published lists or circulars on library matters, to be disseminated among the various public librarians of the State. These are some of the duties of the State librarian.

In view of the foregoing, it is our thought that the State librarian is legally authorized under provisions of Section 181.030, supra, to hold the State library meetings and district library institutes, referred to in Section 182.110, supra.

CONCLUSION

It is therefore the opinion of this department that the State librarian is authorized under provisions of Section 181.030 RSMo 1949 to hold State library meetings and district library institutes referred to in Section 182.110 RSMo Cumulative Supplement 1955.

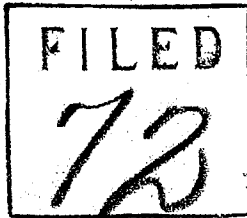
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Paul N. Chitwood.

Yours very truly,

JOHN M. DALTON
Attorney General

PNC/ma

SCHOOLS: Where extended boundary lines of two school districts intersect at a point so that districts touch, they "adjoin" within the meaning of Sec. 165.300, RSMo 1949, so that one may be annexed to another.



June 7, 1956

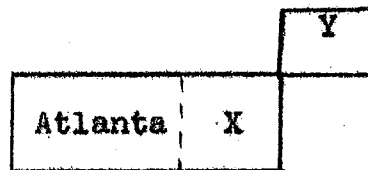
Honorable Charles A. Powell, Jr.
Prosecuting Attorney
Macon County
Macon, Missouri

Dear Mr. Powell:

This is in response to your request for opinion dated April 24, 1956, which reads as follows:

"The County Superintendent of Schools of this County, Miss Mary Graves, has asked me a question relative to the annexation of school districts pursuant to provisions of Section 165.300, MoRS, 1949, on which I can discover no decided cases.

"The question is clarified by the following diagram:



"District X has been annexed to the Atlanta, Missouri School District. Does District Y 'adjoin' the new Atlanta District (cornering as it does) in such a way that it can also be annexed to the Atlanta District within the meaning of the above appropriate section dealing with annexation."

The pertinent portion of Section 165.300 to which you refer reads as follows:

"Whenever an entire school district, or a part of a district, whether in either case

Honorable Charles A. Powell, Jr.

it be a common school district, or a city, town or consolidated school district, which adjoins any city, town, consolidated or village school district, including districts in cities of seventy-five thousand to five hundred thousand inhabitants, desires to be attached thereto for school purposes, * * *

The use of the terms "adjoining," "adjacent," "contiguous," etc., frequently causes confusion because in common parlance they are often used interchangeably, while technically and legally they have entirely different meanings. In the above section on annexation the word "adjoins" is used, as is the word "adjoining" in Section 165.170, RSMo, Cum. Supp. 1955, relating to the division of a common district and the attachment of its territory to "adjoining" districts, and in Section 165.270, RSMo 1949, relating to the formation of a consolidated district out of a village district having less than two hundred children of school age together with two or more "adjoining" districts, while Section 165.273, RSMo 1949, provides for the formation of a consolidated district out of "adjacent" city, town or consolidated districts, regardless of size or enrollment or one or more city, town or consolidated districts, and one or more "adjacent" common districts. Since the Legislature has consistently used the word "adjoining" in all statutes relating to annexation and formation of districts with the exception of Section 165.273 where the word "adjacent" is employed, and since at no place is contiguity and compactness required as it is in some instances, e.g., senatorial districts (Art. III, Sec. 8, Const. of Mo. 1945; Preisler v. Doherty, Mo. Sup., 284 SW2d 427), we presume that by the use of the word "adjoining" in Section 165.300, supra, is meant something other than "adjacent" or "contiguous."

Webster's New International Dictionary, Second Edition, Unabridged, furnishes us with the following definitions:

"Adjoin: To lie contiguous to; to be in contact with; to abut upon; sometimes, inaccurately, to be near or in proximity to."

"Adjoining: Contiguous; adjacent."

"Adjacent: Lying near, close, or contiguous; neighboring; bordering on; as, a field adjacent to the highway."

Honorable Charles A. Powell, Jr.

"Syn. - Nigh, juxtaposed, meeting, touching. - ADJACENT, ADJOINING, CONTIGUOUS, CONTERMINOUS, ABUTTING agree in the idea of proximity. Objects are ADJACENT when they lie close to each other, but not necessarily in actual contact; as adjacent fields, villages. They are ADJOINING when they meet at some line or point of junction; as adjoining farms, estates adjoining the river. CONTIGUOUS properly applies to objects which touch along a considerable part or the whole of one side; as, a row of contiguous buildings, a wood contiguous to the plain. But contiguous is often loosely used without the implication of contact; as, contiguous towns. * * *

A review of a few cases wherein the courts have construed these various terms is helpful and necessary in determining what is meant by the word "adjoining." For example, in Wild et al. v. People ex rel. Stephens, 227 Ill. 556, 81 NE 707, the statute required contiguity. The court held, in regard to a situation similar to the one presented here, that the areas were not "contiguous." At NE 1.c. 708, the court said:

" * * * The only way in which the 310-foot strip touches or adjoins the 200-foot strip is by the fact that they corner with each other. The west line of the first extended is the east line of the second, and the south line of the first extended is the north line of the second. No vehicle, and in fact no person, could pass from one strip to the other without passing over or upon lands not within the village. The two strips last mentioned are not contiguous. * * *

In Hewey v. Gudahy Packing Co., 269 Fed. 21, 23, the court recognized that "adjacent" was not synonymous with "contiguous" in the following language:

" * * * The term 'adjacent,' as employed in the statute, has a broader meaning than 'contiguous.' It signifies also neighboring or in close proximity, though not touching. * * *

In Lefler v. City of Dallas (Tex. Civ. App.), 177 SW2d 231, the statute in one place authorized the annexation of "adjoining"

Honorable Charles A. Powell, Jr.

territory and in another referred to "adjacent" territory. In that case a strip of land ten feet wide and three-fourths of a mile long connected the annexed property with the city limits. The court held that the annexed territory was both "adjoining" and "adjacent."

The Illinois court, in *People v. Keechler*, 194 Ill. 235, 62 NE 525, 527, construed the word "adjacent" thus:

" * * * The word 'adjacent' is defined by Webster and other lexicographers to mean, 'to lie near'; 'close, or contiguous.' It is sometimes said to be synonymous with 'adjoining,' 'near,' 'contiguous.' In some decisions courts have held it to mean 'in the neighborhood or vicinity of'; in others, 'adjoining or contiguous to.' *State v. City of Kansas City*, 50 Kan. 522, 31 Pac. 1100; *In re Camp Hill Borough*, 142 Pa. 517, 21 Atl. 978; *U. S. v. Northern Pac. R. Co.*, 29 Albany Law J. 24; *Henderson's Lessee v. Long*, 1 Cooke, 129, Fed. Cas. No. 6, 354; 1 Am. & Eng. Enc. Law (2d Ed.) p. 633; *Miller v. Cabell*, 81 Ky. 184; *In re Municipality No. 2 for Opening Roffignac St.*, 7 La. Ann. 76. We do not regard any of these cases as furnishing a guide by which to arrive at a definition of the word as used in the foregoing section. It has no arbitrary meaning or definition. Its meaning must be determined by the object sought to be accomplished by the statute in which it is used. This consideration manifestly controlled each of the courts in the interpretation placed upon the word in the cases cited. The sections of the school law which authorize the board of trustees to change the districts in a single township, as well as section 51, supra, were manifestly intended by the legislature to empower them to re-district the township or townships, 'in their discretion,' when properly petitioned for, to suit the wishes or convenience of a majority of the inhabitants of the township or townships.
* * *

The terms "adjacent" and "adjoining" have been distinguished by the New Jersey court in *Yard v. Ocean Beach Ass'n*, 49 N.J. Eq. 306, 24 A. 729, 731, as follows:

Honorable Charles A. Powell, Jr.

" * * * The word 'adjoining' implies a closer relation than 'adjacent.' The latter word, uncontrolled by the context or subject-matter, is not inconsistent with the idea of something intervening. But the primary meaning of the word 'adjoining' is to lie next to, to be in contact with, excluding the idea of any intervening space. Johnson v. District of Columbia, 9 Cent. Rep. 653-655; People v. Schermerhorn, 19 Barb. 540-556; In re Ward, 52 N.Y. 395; Akers v. Railroad Co., 43 N.J. Law, 110. * * *"

The most nearly analogous case we have found, however, is Independent Consol. Sch. Dist. No. 66 v. Big Stone County (Minn.), 67 NW2d 903. There the statute required that the territory to be annexed "adjoin" the district. As in the facts presented here, appellant's lands cornered upon the district. The Supreme Court of Minnesota held that was sufficient to constitute it as "adjoining" land. In so holding the court quoted from 2 C.J.S., Adjoin, page 2, as follows:

" * * * the phrase [adjoining] has been defined as premises which touch and are connected, or in contact, with the other premises involved, rather than those merely lying near or adjacent, * * *."

We take it, then, from the Wild case that these two districts would not be "contiguous," but there is no requirement of contiguity or compactness in the statutes relating to the formation or annexation of school districts. Apparently, with regard to annexation, the Legislature intended to leave the matter of the form and shape of districts primarily within the discretion of the voters in the areas sought to be annexed and the board of the district to which the area is being attached, the only requirement being that it "adjoin," i.e., touch at some point. Since these districts do adjoin, i.e., touch, at the point where the boundary lines intersect, in our opinion District Y can be annexed to the Atlanta District under Section 165.300, supra.

CONCLUSION

It is the opinion of this office that where the extended boundary lines of two school districts intersect at a point so

Honorable Charles A. Powell, Jr.

that the two districts touch at this point, they "adjoin" each other within the meaning of Section 165.300, RSMo 1949, so that if other requisite facts are present the one may be annexed to the other under that section.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English

Yours very truly,

JOHN M. DALTON
Attorney General

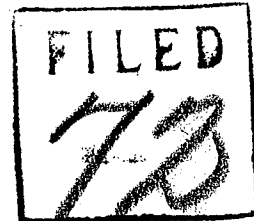
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COUNTY LIBRARIES:
TAXATION:
STATE AID:

1. Delinquent taxes collected for a public library during any fiscal year are to be counted in determining if tax income for such year yields one dollar or more per capita according to latest Federal census so that Library is eligible for State aid in accordance with second standard of Subsection 181.060, Cumulative Supplement 1955. 2. That if tax rate voted for a public library is one or more mills and rate collected is less than one mill, but such tax income yields one dollar or more per capita for previous year, according to population of latest Federal census, as provided by second alternate standard of Subsection 2, Section 181.060 Cumulative Supplement 1955, such library is entitled to State aid.

November 2, 1956

Honorable Paxton P. Price
State Librarian
State Office Building
Jefferson City, Missouri



Dear Mr. Price:

This department is in receipt of your recent request for a legal opinion which reads in part as follows:

"This office would be grateful to you for furnishing a legal opinion on the following questions concerning the interpretation of the law:

(1) Are delinquent taxes collected for the local Library Fund during any given county fiscal year to be counted in determining the eligibility of the local library for State Aid to Public Libraries in compliance with the eligibility requirements set forth in Section 181.060, RSMo. 1955 Supplement? Or, is only the tax yield from a fixed rate levied against the fixed assessed valuation for any given county fiscal year to be counted toward eligibility?

"For computing any given library's eligibility for State Aid under Standard (2) in Section 181.060, 2, it is necessary to know just what tax yields are to be counted since county tax collectors deposit in the treasurer's Library Fund record all tax yields, both current yields and delinquent tax yields.

(2) If the tax rate voted is one or more mills and the rate collected is less than one mill, but produces an amount equal to or exceeding one dollar per capita, is the library eligible to receive State aid under the provisions of Section 181.060, Cumulative Supplement 1955?"

Section 181.060, RSMo. Cumulative Supplement 1955, is referred to in the opinion request and reads in part as follows:

Honorable Paxton P. Price

"1. The general assembly may appropriate moneys for state aid to public libraries, which moneys shall be administered by the state librarian, under rules and regulations of the state library commission.

"2. At least fifty per cent of the moneys appropriated for state aid to public libraries shall be apportioned to all public libraries established and maintained under the provisions of the library laws or other laws of the state relating to libraries. The allocation of the moneys shall be based on an equal per capita rate for the population of each city, village, town, township, school district, county, or regional library district in which any library is or may be established, in proportion to the population according to the latest federal census of the cities, villages, towns, townships, school districts, county or regional library districts maintaining tax supported public libraries. No grant shall be made to any public library if the rate of tax or the appropriation for the library should be decreased below the rate in force on December 31, 1946. Grants shall be made to any public library, according to two alternate standards:

(1) To any public library which has at least a one-mill tax voted in accordance with sections 182.010 through 182.460 RSMo, or

(2) To any public library for which the tax income yields one dollar or more per capita for the previous year according to the population of the latest federal census."

The above quoted section provides that grants of State aid are made to public libraries found to be qualified under two alternate standards which are: (1) To any public library which has at least a one mill tax voted in accordance with Sections 182.010 through 182.460, RSMo. or, (2) To any public library for which the tax income yields one dollar or more per capita for the previous year according to the latest Federal census.

It is necessary for a library to meet one or the other of these standards and is not required to meet both of them in order to be eligible for State aid.

Honorable Paxton P. Price

The first inquiry makes no reference to the one mill tax rate stated in the first standard, but is concerned with whether or not delinquent taxes can be counted in determining the necessary one dollar per capita yield of the tax income for the previous year, as referred to in the second standard. Therefore, our present efforts will be directed to discussing that part of Section 181.060.

The answer to the first inquiry will depend solely upon the construction placed on the second standard of said section, and while there are many rules of statutory construction which might be of assistance here, we believe that it will be necessary to call attention to and follow only one such rule. We refer to the primary rule that a statute is to be construed in such a manner as to give effect to the intent of the Legislature, if possible, from the words used in the statute, and that in the absence of any indication that the words were used in a technical sense, they are to be given their plain or ordinary meaning. This principle is so well understood and so long established that no useful purpose would be served by citing legal authority to support it.

With this rule in mind we find it proper to consider the intended meaning of a few of the terms used in Section 181.060, supra, before attempting to construe the entire meaning of the second standard given in said section. We refer to the terms "tax income" and "previous year," which we believe to be of particular significance to our present purpose.

We are unable to find any Missouri statutes or court decisions defining these terms, hence we turn to the decisions of other courts for definitions of same. The terms "this year," "previous year," and "current year," were defined in the case of Clark v. Lancaster County, 96 NW 593, and at l.c. 599 the court said:

" * * * It must be conceded that ordinarily, when we use the terms 'this year,' 'the current year,' or 'the previous year,' we mean in each instance the calendar year in which the event under discussion took place and the one before it. * * *"

Also, in the case of Syracuse Savings Bank v. Brown et al., 42 N.Y. Supp. 2nd, at l.c. 158, the court defined some of the terms used in the Soldiers' and Sailors' Relief Act of 1940, as amended, and said:

Honorable Paxton P. Price

" * * * In my opinion, 'order previously made' means order made before and at any time up to the judgment of foreclosure. Previous is synonymous with 'next prior to' or 'next preceding' and does not mean a period prior to the date of the Soldiers' and Sailors' Civil Relief Act or the date the soldier entered the military service. State ex rel. Lewis v. Board of Education of New Haven, 88 Conn. 436-440, 91 A. 529; State of Iowa v. Gunagy, 84 Iowa 177, 50 N.W. 882. Any other construction would take from the language its ordinary significance. It would leave mortgagees without protection if a soldier defendant entered the service before the act took effect or before the action was begun (John Hancock Mut. Life Ins. Co. v. Lester, 234 Mass. 559-561, 125 N.E. 594); or where they are unable to satisfy the Court that no defendants are in such service."

While the term "tax income" was not defined in the case of Lamar W. & L. Company v. City of Lamar, 128 Mo. 188, one of the issues raised was whether the annual tax limitation fixed by Sections 11 and 12, Article X, Constitution of Missouri, 1875, prohibits fourth class cities from collecting a special tax annually for a public water supply in excess of the constitutional limitations. It was held that in determining what constitutes "income and revenue provided" for one year, within the meaning of Section 12, Article X of the Constitution, all sources of income, including that from licenses, should be estimated.

Again, considering the provisions of the statute before us, these questions are presented: Was it the legislative intent that any public library whose tax income (i.e., proceeds from current and delinquent taxes) collected from all sources yields one dollar or more per capita for the previous year is entitled to state aid, or was it the legislative intent that any public library whose tax income consisting of taxes assessed and collected the same year and which yields one dollar or more per capita for the previous year is entitled to state aid? Needless to say, if the construction were adopted to which we referred in the second question, any income from delinquent taxes collected during the previous year could not be considered as income for such previous year.

Honorable Paxton P. Price

On the other hand, if the construction were adopted to which we have referred in the first question, then it is obvious that all taxes collected during the previous year, whether current or delinquent, would be considered as tax income, and used as a basis for determining whether the tax income yielded at least one dollar or more per capita and the eligibility of the particular library for aid.

We note that the words of the second standard of Section 181.060, supra, are not that the tax income of the previous year shall consist only of the proceeds of taxes assessed and collected that year, or that delinquent taxes are not included in the term "tax income" in arriving at the amount of tax yield for the previous year. No such descriptive language or limitations have been used in the section with reference to the term, and since the lawmakers have not seen fit to do so, it is believed to be the legislative intent that the term "tax income" was to include all taxes, whether current or delinquent, collected during the previous year, and regardless of when the total collections were turned over to the county treasurer, so long as such tax income yields one dollar or more per capita.

For example, if the taxes for 1955, together with delinquent taxes (that is, taxes due and payable in 1954 or prior years), are collected but the collector did not turn over his December collections to the treasurer until in January, 1956, and if the total collections for 1955 yielded one dollar or more per capita, a public library of a county or city in which the collections were made would be eligible for grants of state aid.

The second inquiry asks if the tax rate voted is one or more mills and the rate collected is less than one mill but produces an amount equal to, or not exceeding, one dollar per capita, under the provisions of Section 181.060, Cum. Supp. 1955, is a public library entitled to state aid.

The second standard of Section 181.060, supra, does not provide what the tax rate shall be or that the tax rate authorized by a majority of the voters of a county or city library district, under the provisions of Sections 182.010 to 182.460, RSMo 1949, shall be collected in order for a public library of such district to be eligible for state aid, consequently it appears that such was not the legislative intent. Rather, it is believed to be the legislative intent, as shown by the express provisions of said second standard, that the basis for

Honorable Paxron P. Price

determining the eligibility of a public library for state aid is on the tax yield and not on the tax rate, and that if the tax income for the previous year is one dollar or more per capita, the public library is eligible for state aid, regardless of what tax rate is collected.

Therefore, in answer to the second inquiry, it is our thought that if the tax rate voted for a public library is one or more mills, and the rate collected is less than one mill, but produces a tax income for the previous year of one dollar or more per capita, in accordance with the provisions of the second standard specified in Section 181.060, supra, said library is eligible for grants of state aid.

CONCLUSION

It is therefore the opinion of this department:

(1) That delinquent taxes collected for a public library during any fiscal year are to be counted in determining if the tax income for such year yields one dollar or more per capita according to the latest federal census, so that a library is eligible for grants of state aid in accordance with the second alternate standard of Subsection 2, Section 181.060, Cum. Supp. 1955.

(2) That if the tax rate voted for a public library is one or more mills, and the rate collected is less than one mill, but such tax income yields one dollar or more per capita for the previous year, according to the population of the latest federal census, as provided by the second alternate standard of Subsection 2, Section 181.060, Cum. Supp. 1955, such public library is eligible for state aid grants.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Paul N. Chitwood.

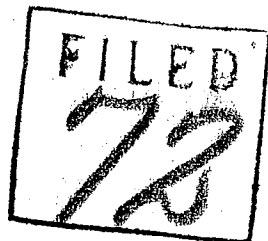
Yours very truly,

JOHN M. DALTON
Attorney General

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LEGISLATIVE
RESEARCH
COMMITTEE:

Legislative Research Committee cannot validly pay out of the general appropriation fees of attorneys employed by it to render legal opinions on Attorney General's opinion, nor of secretaries assigned to these attorneys.



Has no authority to pay costs or attorney's fees in a lawsuit filed by a state senator attempting to collect payment of expenses he claims he is entitled to receive for attending Senate Committee Meetings.

December 5, 1956

Honorable Charles H. Pulis
Representative Audrain County
Mexico, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"I would like to have an opinion on the following set of facts. As you are of course aware, sometime ago your department rendered an opinion holding that legislative committees could not be paid for meeting at times when the legislature was not in session. Subsequent to that ruling by you the Legislative Research Bureau employed two attorneys, Jasper Smith and A. L. McCauley, to render an opinion to them regarding the validity of this opinion. This opinion was rendered and the two attorneys mentioned were paid the sum of \$500 each for their legal services. In addition to this, some one hundred dollars in expenses were paid. I would like to have your official opinion as to whether or not this was a proper expenditure by the Legislative Research Committee which paid the above sum of money out of its appropriations.

"I also want to call your attention to this situation, which is that Senator Jack Jones of Carrollton has filed in the Circuit Court of Cole County a suit to test the validity of your opinion. I would like to know whether or

Honorable Charles H. Pulis

not the costs of this suit, including payment to attorneys and court costs, can legally be paid out of the appropriations to the Legislative Research Committee."

All references to statutes herein will be to Revised Statutes of Missouri 1949 unless otherwise indicated.

The duties of the committee on legislative research are set forth in Section 23.020 which reads:

"The committee here created shall perform the following services for the members of the general assembly;

"(1) Provide a research and reference service on legislative problems;

"(2) Upon written request, make such investigation into legislative and governmental institutions of this state or other states as would aid the general assembly;

"(3) Upon written request, assist and cooperate with any interim legislative committee or commission created by the general assembly;

"(4) Upon written request, draft or aid in drafting bills, resolutions, memorials, and amendments, and render any other service in connection therewith for any member of the general assembly."

The persons whom the committee may employ are set forth in Section 23.080 which reads:

"The committee is authorized to regularly employ for a period not exceeding two years from date of appointment, and fix the compensation of, a research officer, who shall be competent to assume administration of the necessary activities of the committee under the

Honorable Charles H. Pulis

direction of the committee. The committee shall also be authorized to employ such other clerical and research assistance as it may deem necessary within the limits of the appropriation made out of the general revenue of the state for the purpose of carrying out the provisions of this chapter. Said committee shall also fix the compensation of the custodians of the house and the senate and shall make and enforce reasonable rules and regulations for the care of the senate and house chambers, including the bill rooms, and filing room, and the furniture, files, and supplies therein. Said committee is authorized to provide necessary legal reports and other publications to be kept in the library of the committee, and to pay for same out of any appropriations made to such committee. The secretary of state is hereby authorized to furnish the librarian, without charge, such number of Missouri statutes and acts as may be desired by the committee to enable it to exchange such acts for those of other states."

It would seem to us quite clear that the hiring of attorneys Jasper Smith and A. L. McCawley did not come within the purview of Section 23.080, supra. Rendering a legal opinion on an Attorney General's opinion could not be classified as "research assistance." Neither do we believe that any expenditure for secretarial services rendered to Messrs. Smith and McCawley in the preparation of this opinion would be valid because such expense was not incurred in carrying out the purposes for which the legislative research committee was created. But Section 23.080, supra, clearly does not authorize the Legislative Research Committee to hire attorneys to render legal opinions.

CONCLUSION

It is the opinion of this department that the committee on legislative research cannot validly pay out of

Honorable Charles H. Pulis

its general appropriation fees of attorneys employed by it to render legal opinions on Attorney General's opinions nor of secretaries assigned to these attorneys. It is the further opinion of this department that the Legislative Research Committee has no authority to pay costs or attorney's fees in a lawsuit filed by a state senator attempting to compel payment of expenses he claims he is entitled to receive for attending Senate Committee Meetings.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

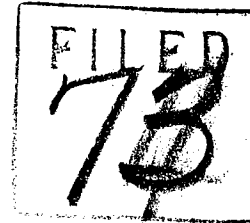
John M. Dalton
Attorney General

HPW:lc

STATE MENTAL HOSPITALS:
PERSONAL PROPERTY OF INMATES:
DISPOSITION:

In a situation where a patient leaves a mental hospital on discharge or convalescent leave, and leaves in his personal account at the hospital unclaimed funds, there is no existing means by which any disposition can be made by the hospital of these funds. Further, in a situation where a patient in a state mental hospital dies, or leaves the state mental hospital on convalescent leave or discharge and in either situation leaves at the state mental hospital personal property which is unclaimed, such property may become the property of the state hospital as "abandoned property," in those cases where the fact situation brings the property within the purview of the law holding property to be abandoned.

January 5, 1956



Honorable B. E. Ragland
Director, Division of Mental Diseases
Department of Public Health and Welfare
State Office Building
Jefferson City, Missouri.

Dear Sir:

Your recent request for an official opinion presents two questions, the first of which is:

"What disposition should be made of unclaimed funds in personal accounts of patients who have left a state mental hospital by convalescent leave or discharge?"

We here note that all references to statutes are to RSMo 1949.

We see no way in which anything can be done with such funds as you describe above.

Paragraphs 1 and 2 of Section 202.060 read as follows:

"1. The director of the division of mental diseases in the department of public health and welfare shall immediately use all proper diligence to return to the persons entitled thereto all funds held by the officials of the respective state institutions for mental diseases that shall have been heretofore deposited with said officials by inmates, and relatives and friends of inmates, to be used by such officials for the welfare and benefit of inmates who shall have deceased.

"2. If, after said director of the division of mental diseases has diligently used such methods and means as he shall consider reasonable to refund said funds, there

Honorable B. E. Ragland

shall remain in the hands of any such officials any money, the owner of which being unknown to said director, or if known, said director cannot locate such owner, in each and every such instance said money shall escheat and vest in the state of Missouri, and it shall be the duty of said director and officials to pay the same to the state director of revenue, taking a receipt therefor, who shall deposit the money in the state treasury to be credited to a fund to be designated as 'escheat.'"

It will be noted that the above is applicable only when the former inmate is known to be deceased, which is not the fact in the situation which you present. Such being the situation, we do not, as we said, see any way in which anything can be done with these funds until it is known that the former inmate is deceased.

Your second question is:

"2. What disposition should be made of other unclaimed personal property belonging to patients who have died or left a state mental hospital by convalescent leave or discharge?"

In this situation we believe that in many instances the theory of abandonment would be applicable. The most recent statement (1952) as to what constitutes an abandonment is found in the case of *Linscomb v. Goodyear Tire and Rubber Co.*, 199 F.2d 431. In its opinion in that case the court stated (1.c.435):

"* * * In this case the law of the state of Missouri is applicable. We have recently had occasion to consider the Missouri law on the issue of abandonment. *Equitable Life A.S. v. Mercantile-Commerce Bank & Trust Co.*, 8 Cir., 155 F.2d 776; *Rosenbloom v. New York Life Ins. Co.*, 8 Cir., 163 F.2d 1; *Motlow v. Southern Holding & Securities Corp.*, 8 Cir., 95 F.2d 721. In *Equitable Life A.S. v. Mercantile-Commerce Bank and Trust Co.*, supra [155 F.2d 780], we said that the definition of Missouri courts was to the effect that abandonment 'is a fact made up of an intention to abandon, and the external act by which the intention is carried into effect.' In *Rosenbloom v. New York Life Ins. Co.*, supra [163 F.2d 8], also determined under the laws of Missouri, we among other things said, 'For this court, Judge Johnsen has recently stated the Missouri rule in *Equitable Life Assur. Soc. of United States v. Mercantile-Commerce Bank & Trust Co.*, 155 F. 2d [776] 777, 779-780.'"

Honorable B. E. Ragland

We also note Section 7 C.J.S., Vol. 1, page 15, which states in part:

"An intention to abandon property, or a right, will not be presumed, at least where the conduct of the owner or holder can be explained consistently with an intention to hold or continue to claim the thing. It has even been said that the presumption is that one having property or a right did not intend to abandon it, but this is probably to be given no more weight than as a statement in different language of the general principle that abandonment will not be presumed; and, on the contrary, it has been held that, if the thing asserted to have been abandoned is shown to have been deemed by its owner, and by the general opinion of the community, valueless and merely a hindrance, the presumption that the owner intended to preserve it, or that he did not intend to abandon it, cannot arise, and that conduct on his part, inconsistent with an intention to continue to claim the property or right, may raise a presumption of abandonment, but these would seem to be inferences drawn from the facts, rather than presumptions, properly so called (Evidence § 115 [22 C.J. p. 83 notes 60-62]).

"So, the burden of proving an abandonment rests on one who asserts or relies on it, and it is incumbent on him to make it affirmatively appear that the property or right has been relinquished by its owner or holder, with the intention of abandoning it, and with no intention of returning to or reclaiming it."

We also call attention to Sections 8 and 9 et seq., which read, respectively:

"The question of abandonment vel non, that is, whether there has been actual relinquishment of property or a right, and an intention to abandon it, is ordinarily a question of fact, to be determined by the jury under all the circumstances of the case, and not a question of law, although it has, somewhat loosely, been said to be a question of mixed law and fact.

"Where, however, there is, and can be, no dispute about the facts, that is to say, where all the essential facts are admitted or indisputably proved, and the inferences to be drawn from them are certain and free from doubt, and establish the fact of abandonment with reasonable certainty, the question may be withdrawn from the jury,

Honorable B. E. Ragland

and abandonment be declared by the court as a matter of law; or, on the other hand, where the evidence is, as a matter of law, insufficient to show abandonment, it seems that the court may likewise determine the question without submitting it to the consideration of the jury."

"An abandonment of property or a right divests the title and ownership of the owner, as fully and completely as would a conveyance, from the time of the act of abandonment, and so, while the term 'loss' has a different connotation from 'abandonment,' and is properly to be distinguished therefrom, an abandonment may be said to amount to the loss, in the more general sense of that word, of the abandoning owner's interest in, or title to, the property or right abandoned, so as to bar him from further claim to it, except as he, like anyone else, may thereafter appropriate it and make it his own if it has not already been appropriated by another. One who has abandoned property does not regain legal possession or ownership of it by mere vague utterances as to its probable future value, and indefinite suggestions as to what he may do with it in time to come.

"Personalty, on being abandoned, ceases to be the property of any person, and thenceforth is no man's property, unless and until it is reduced to possession with intent to acquire title to, or ownership of, it. It may, accordingly, be appropriated by anyone, if it has not been reclaimed by the former owner, and ownership of it vests, by operation of law, in the person first lawfully appropriating it and reducing it to possession with intention to become its owner, provided, as has been said, the taking is fair. One so appropriating abandoned property, or any third person whom he may allow to take it, has a right to the property superior even to that of the former owner, and may hold it against him. In certain instances it has been held, probably as an application of these rules as to abandonment and appropriation, although this is not entirely clear, that personalty abandoned on the land of another became the property of the owner of such land."

Also to subsection (b) of Section 7, C.J.S., Vol.1, page 15, which states:

"The courts have held that, on a question of abandonment, as on one of fraud, a wide range should be allowed as to the evidence, both that tending to prove abandonment and that tending to rebut the allegation. Like any other fact, abandonment may be shown by circumstances, or it may be proved by the acts, conduct, or declarations of the abandoning owner."

Honorable B. E. Ragland

Whether or not personal property belonging to patients who have died or who have left a state hospital by convalescent leave, has become abandoned property depends upon the fact situation in each case, in the light of the statement of the law above as to when property is considered to be legally abandoned.

CONCLUSION

It is the opinion of this department that: In a situation where a patient leaves a mental hospital on discharge or convalescent leave, and leaves in his personal account at the hospital unclaimed funds, there is no existing means by which any disposition can be made by the hospital of these funds.

It is the further opinion of this department that personal property belonging to patients who have died or who have left a state hospital by convalescent leave, leaving such property in the hospital, may become the property of the state hospital as "abandoned property" in those cases where the fact situation brings the property within the purview of the law holding property to be abandoned.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW/ld

VOTER REGISTRATION: All unregistered residents of Joplin are required to register before being eligible to vote, in primary and general elections, regardless of the county in which such city residents may reside.



April 6, 1956

Honorable John M. Rice
Prosecuting Attorney
Newton County
Neosho, Missouri

Dear Mr. Rice:

Your recent request for an official opinion was stated as follows:

"I would appreciate your opinion concerning the following situation. Section 116.010 R. S. Mo. 1949 provides that 'there shall be a registration of qualified voters in every city containing at least ten thousand inhabitants located in any county not having a provision for registration of voters.' The City of Joplin has a population of approximately 38,000 and is located principally in Jasper County. One voting precinct of Newton County, Stapelton precinct, is located within the city limits of the City of Joplin. Are voters of Stapelton precinct required to register in order to be eligible to vote in primary and general elections?"

It is our opinion that the voters of Stapelton precinct, who have not registered prior to July 1, 1955, are required to register before being eligible to vote in a primary or general election. Section 116.010, 1955 Cum. Supp., RSMo 1949, eliminates the necessity of re-registration for those registered prior to July 1, 1955, unless some other section of Chapter 116 requires it.

You will note that in all of the chapters pertaining to registration, all but Chapter 113 apply to and are directed toward registration in cities. The same was true with Chapters 114 and 115 that have now been repealed. It is believed

Honorable John M. Rice

that the reason for the words "in counties not having a provision for registration" or the words "in any county not having a provision for registration" were inserted because of the fact that Chapter 113 does require county-wide registration.

It is, therefore, felt that such wording was not used for the purpose of requiring registration in only those cities located completely within any one county. Since Joplin is a city now coming within the provisions of Chapter 116 (before the 1955 repeal it came within the provisions of Chapter 115), it seems clear that all of the residents of Joplin are required to register regardless of the county in which such city residents might reside.

For further answer to your specific question attention is invited to Section 116.130, which states: "Any qualified voter who shall appear at the polls to vote at any primary or general election for which registration may be required shall, before procuring a ballot, identify himself * * *."

CONCLUSION

We therefore conclude that the residents of Joplin residing in Newton County who have not registered prior to July 1, 1955, are required to register before being eligible to vote in any primary or general election.

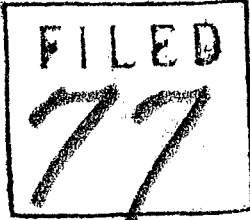
The foregoing opinion, which I hereby approve, was prepared by my assistant, Russell S. Noblet.

Very truly yours

John M. Dalton
Attorney General

RSN:lc

STATE VETERINARIAN:
VETERINARY BOARD:
AGRICULTURE:



A person is entitled to a non-graduate license to practice veterinary medicine only if such person has, for each year during the twenty years immediately preceding the effective date of Section 340.040 RSMo Cum. Supp. 1955, made the greater percentage of his income from the treatment of animals, and who has resided in the same town or community during said period.

December 10, 1956

L. A. Rosner, D.V.M.
Chairman
Missouri Veterinary Board
Jefferson Building
Jefferson City, Missouri

Dear Dr. Rosner:

Reference is made to your request for an official opinion of this office, which request reads as follows:

"At Section 340.040, Revised Statutes of Missouri 1949, provises as follows:

" 'Any person who for each year during the past twenty years has made the greatest percentage of his income from the treatment of animals and who has resided in same town or community during this time shall be issued a non-graduate license upon filing proof of these qualifications with the Board.'"

"Some question has arisen as to the twenty year period in that it has been contended on one hand that the twenty years starts to run as of the time of the beginning of the qualified activity until the time of the effective date of this Act. On the other hand it has been contended if the twenty year period might well cover the period from the beginning of the time of the qualified activity until the time of the making of the application by the applicant, which, of course, might be made several years after the enactment of the Act.

"We are most concerned since the Board was of the opinion that the effective ending date of the twenty year period would be the effective date of the Act, therefore, we should like to have your opinion as promptly as is possible on this matter."

L. A. Rosner, D.V.M.

Section 340.020, RSMo Cum. Supp. 1955, provides that it shall be unlawful for any person not licensed as a veterinarian under the provisions of Chapter 340, RSMo Cum. Supp. 1955, to practice veterinary medicine.

Section 340.180, RSMo Cum. Supp. 1955, provides that any person who shall violate any of the provisions of this chapter shall, upon conviction, be deemed guilty of a misdemeanor.

Section 340.040, RSMo Cum. Supp. 1955, provides, as you indicated, that a person who, for each year during the past twenty years, has made the greater percentage of his income from the treatment of animals, and who has resided in the same town or community during such time, shall be entitled to a non-graduate license upon filing proof of these qualifications with the board.

You now inquire whether the twenty-year period above referred to is determined from the beginning of the classified activity until the effective date of the act, or whether said period is from the beginning of the qualified activity until the time of the making of the application for licensure. An almost identical question was presented in the case of Higgins v. Board of Medical Examiners, 104 Pac. 953. In that case the statute provided that "all persons who have made the practice of medicine and surgery their profession or business, continuously, for the period of ten (10) years, within this state, and can furnish satisfactory evidence thereof to the State Board of Medical Examiners, shall receive from said board a license". Plaintiff, who was not a graduate in medicine, brought suit to compel the Board to issue him a license under the above-noted provision, claiming that he had practiced medicine and surgery for a continuous period of ten years, part of which time was after the passage of the licensing act. In disposing of this question the court said:

"The plaintiff in error relies upon the concluding sentence of section 4 to sustain him. He insists that the practicing of medicine and surgery for any continuous period of 10 years, whether before or after the passage of the statute mentioned, although in defiance of law, entitles him to a license, while it is the contention of the board that no person is entitled to a license from the board unless: (1) He proves that he is a graduate of a legally chartered medical school of good standing. (2) He passes a satisfactory examination. (3) He proves that he has made the practice of medicine and surgery his profession

L. A. Rosner, D.V.M.

or business continuously for the period of 10 years prior to the passage of the act.

"Section 12 of the act provides that the person who practices medicine in the state without a license from the Board of Medical Examiners shall, upon conviction, be punished by fine or imprisonment, or both; and to adopt the plaintiff in error's construction would be to reward, not punish, those who elude prosecution for the period of 10 years. The law should not be so construed, and we hold that the contention of the board is correct, and that those only who have practiced for 10 years prior to the passage of the law of 1881 are exempted from the provisions of the statute requiring examination and proof of graduation. In the case of State v. Wilson, reported in 61 Kan., at page 791, 60 Pac. 1054, that court said: 'Can it be that the Legislature intended that a person might qualify himself for the practice by that which the act prohibited? Is the direct and persistent violation of the law to be deemed the equivalent of character, education, experience, and skill which the statute requires for the protection of life and health?' These identical questions are presented to us, and we do not hesitate to answer them in the negative."

We believe that the reasoning contained in the above-noted case would likewise be applicable to Section 340.040, RSMo Cum. Supp. 1955, and that the proper interpretation of said section would require a holding that the twenty-year period referred to means before the passage of said section. We believe that such conclusion is further evidenced by the fact that Section 340.040, RSMo Cum. Supp. 1955, refers to the "past" twenty years, which language unequivocally places the period prior to the effective date of the act.

CONCLUSION

Therefore, it is the opinion of this office that a person is entitled to a non-graduate license to practice veterinary medicine only if such person has, for each year during the twenty years immediately preceding the effective date of Section 340.040, RSMo Cum. Supp. 1955, made the greater percentage of his income from the

L. A. Rosner, D.V.M.

treatment of animals, and who has resided in the same town or community during said period.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Donal D. Guffey.

Very truly yours,

John M. Dalton
Attorney General

DDG/ld

ELECTIONS: Registration lists or cards in counties having more than
COUNTIES: 200,000 inhabitants and less than 450,000 inhabitants are
public records and subject to inspection by the public.



March 15, 1956

Board of Election Commissioners
St. Louis County
Clayton 5, Missouri

Gentlemen:

This will acknowledge receipt of your request for an opinion which, for the sake of brevity, we are restating.

You inquire if the Board of Election Commissioners of St. Louis County is, under law, required to show any person upon demand the registration card of another registered voter. The particular information desired by such persons is to find out if the said registered voter actually voted at the particular election and not as to how he voted. This is indicated by a check mark upon the register list or card.

Elections in St. Louis County are governed to a large extent by the provisions of Chapter 113, MoRS 1949, and Cum. Supp. 1955, applicable to counties having more than 200,000 inhabitants and less than 450,000 inhabitants. However, the conduct of elections in said county, for most purposes, is governed by the provisions of Chapter 111, MoRS 1949, and Cum. Supp. 1955.

Section 111.010, MoRS 1949, specifically makes the provisions of Chapter 111, supra, applicable to such counties. Section 111.550, MoRS 1949, requires that the voter's name at an election shall be immediately checked on the register list when he appears to cast his ballot.

Said register list contains no information whatsoever as to the particular manner in which anyone voted in said election.

Volume 45, Am. Jur., Section 20, page 429, laid down the general principle that registration lists are public records and reads, in part:

"* * *Pollbooks and registration lists are public records which may be examined by those persons who have the requisite interest. The record

Board of Election Commissioners

of the proceedings of an electoral board, required by law to be kept by its secretary and custodian, is a public record, and open to inspection by the public, except in so far as secrecy is enjoined by law, but where the disclosure of its contents would be injurious to the public interest, an inspection will not be granted.* * * *

In State ex rel. Kavanaugh vs. Henderson, 350 Mo. 968, 1.e. 973, 169 S.W. 2d. 389, the court held that in all instances where, by law, a document is required to be filed in a public office, that it is a public record and subject to inspection by the public. In so holding, the court said:

"(2) In all instances where, by law or regulation, a document is required to be filed in a public office, it is a public record, and the public has a right to inspect it. 53 Corpus Juris, Section 1, pages 604 and 605; Clement v. Graham, 63 Atl. 146, 78 Vt. 290; Robinson vs. Fishback, Ann. Cas. 1913 B, 1271, 93 N.E. 666, 175 Ind. 132; State ex rel. Eggers vs. Brown, 134 S.W.(2d) 28, 345 Mo. 430.

"Section 4889, supra, also gives authority to the Supervisor 'to make such other rules and regulations as are necessary and feasible for carrying out the provisions of this act as are not inconsistent with this act.' Under this authority, the appellant's predecessor did promulgate Regulation Number 16, which did require liquor dealers to send the Supervisor a copy invoice of liquor sales. As long as that Regulation was in effect, of course, they were public records and respondent was entitled to inspect them. This is not now disputed by the appellant."

Section 113.230, MoRS 1949, provides the type and manner of keeping registration records of such counties. Said provision further requires that such registration records shall be safely kept by the Board of Election Commissioners and subject to public inspection and reads, in part, as follows:

"* * * *The registration records shall be safely kept by the board of election commissioners, subject to public inspection."

Board of Election Commissioners

Section 113.320, MoRS 1949, further requires the election commissioners of said county to deliver not later than the day prior to the election the registration book of the particular precinct to the judges of election.

In view of the foregoing we conclude that such registration records are required by law to be kept by the Board of Election Commissioners, and they are public records. Since such records do not impart any secret information that might disclose how anyone voted at said election they are open to public inspection. We appreciate the fact this might entail some additional work and expense on the part of your Board and personnel. However, in the absence of some statute specifically exempting from public inspection such records, they are subject to inspection by the public.

CONCLUSION

Therefore, it is the opinion of this department that registration lists or cards in counties having more than 200,000 inhabitants and less than 450,000 inhabitants are public records and subject to inspection by the public.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett.

Yours very truly,

ARH:mw

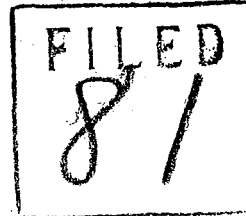
John M. Dalton
Attorney General

STATE TRAINING SCHOOLS: Any money appropriated for the State Training School at Tipton should not be paid to the State Training School at Chillicothe, after the transfer of the inmates of the Tipton School to the School at Chillicothe.

Also, the \$15.00 per month paid to the various schools by the county from which the inmate comes, should, after the transfer of the inmates of the Tipton School to the School at Chillicothe, be paid to the Chillicothe Institution for each transferee from the Tipton School.

February 24, 1956.

Honorable W. E. Sears
Director
State Board of Training Schools
Jefferson City, Missouri



Dear Sir:

Your recent request for an official opinion reads:

"The 68th General Assembly, through its appropriations and in accordance with legal provisions established by earlier assembly, made possible the combination of the Training School for Negro Girls at Tipton to be combined as a part of the Training School for Girls in Chillicothe. It is believed this combination of the two programs will become a reality on or about September 1, 1956.

"Appropriations were also made to provide for the expansion of one girls cottage now on the campus at the girls school in Chillicothe so the structure would adequately house the colored girls at such time the physical transfer was accomplished. Contracts for the necessary renovation of the building are now in the process of being perfected.

"The legislature, in giving normal appropriations (Personal Service, Operations, Additions, Repairs & Replacements), relating to the Training School for Negro Girls, were materially reduced, yet designed to care for the operation of the colored girls school for a period of time until combining of the institutions could become a reality, or to care for the remaining time of this biennium. We have found it most difficult to operate the school in Tipton in keeping with these limited funds. The quarterly releases have proven inadequate in many areas but we have been able to keep within the limitations and therefore, at the time the actual combination of the two schools is made, there

Honorable W. E. Sears

will exist in the normal funds certain balances that will be apparent on or about September 1, 1956. If the cost of maintaining the school remains as high as it has in the past several months, we may be forced to request a release of quarterly funds in advance of their due date. The request for such a release will be only as a last resort in our efforts to keep the school properly operating.

"The problem of administering the distribution of these funds, after the schools are combined, together with the expenditure of funds from the training school operation at Chillicothe to provide for a well-rounded rehabilitation program from the period of September 1, 1956, to the end of the biennium, presents a series of problems on which we would appreciate your advice and counsel.

"There will be certain members of the personnel of the school in Tipton that will assume responsibility at the Chillicothe school on a full-time basis when the combination is made. There will be other personnel now employed at the Tipton school that will be released from duty. The regular operation of caring for the colored girls will continue to exist with relation to food, medical service, the educational program, recreational activities, clothing, and other related areas.

"The physical property of the building at Tipton will, according to law, be transferred to the Department of Corrections. At this writing, I am not aware of what use they intend to make of the facility. The fact remains, however, that revenue directed to the Training School for Negro Girls in the area of 'Repairs and Replacements' and 'Additions' will not be transferred to the Department of Corrections for structural improvement.

"A question immediately arises as to how the unexpended funds of the Training School for Negro Girls may be utilized in their maintenance cost for the rest of this biennium after the girls and personnel are part of the total program at the school in Chillicothe. It is not known whether the unexpended balances may be added to the funds existing at the girls school in Chillicothe or whether the girls school at Chillicothe may bill the Training School for Negro Girls funds for necessary expenditures within the amount of revenue available.

Honorable W. E. Sears

The possibility also exists there will not be sufficient funds in the Training School for Negro Girls appropriation to cover the full remaining months of the entire biennium.

"One other problem just occurred to me that should receive your consideration. As you know, the various counties pay a quarterly maintenance fee of \$15.00 per month to the various schools, based upon the number of individuals committed to our care. After the consolidation of the schools and until the next biennium, how shall this revenue be accredited and expended?

"In light of the brief and general discussion of problems that will soon arise, we would appreciate being specifically advised as to how funds existing at the two girls schools may be properly processed through the office of the Comptroller, and that of the State Treasurer, so full operation of the two programs which now exist, and their combination into one unit, may be successfully realized in accordance with the law. It is hoped your reply will be specific in nature so copies of the reply may be made and forwarded to administrative officials at the girls school in Chillicothe and the fiscal officers of this office, to the end that united and co-operative effort may be realized in accordance with directives you supply.

"Due to the nature of the problems so outlined, we would appreciate having an early reply so we can gear our present and future activities in keeping with the numerous decisions your office will make. In the event we can be of any assistance to you in supplying specific data not covered in this communication, please advise."

Provisions for the change which you have discussed above were made by the 66th General Assembly, Laws of Missouri, 1951, page 365, sections 1 and 2 of which read:

"1. As soon as practicable after the effective date of this act and when adequate separate housing is made available at Chillicothe by the General Assembly and the state Board of Training Schools, the state board of training schools may transfer all the inmates of the state training school located at Tipton, Missouri to the state training school located at Chillicothe, Missouri.

"2. Immediately after the transfer of the inmates as provided in section 1 of this act the care, custody

Honorable W. E. Sears

and control of the property, now comprising the state training school at Tipton, Missouri shall be vested in the department of corrections."

From the above it is clear that what is contemplated is the complete extinguishment of the state training school at Tipton, and that this extinguishment will take place immediately after the transfer of the inmates of the school to Chillicothe.

You state that the appropriation for the school at Tipton was designed only to meet the needs of the school until its discontinuance, which you state you believe will be about September 1, 1956.

The question which you ask is: "A question immediately arises as to how the unexpended funds of the training school for negro girls, (at Tipton) may be utilized in their maintenance cost for the rest of this biennium after the girls and personnel are part of the total program at the school in Chillicothe?" This question raises the question of whether the money appropriated for the maintenance of the state training school at Tipton can be spent by another institution, namely the state training school at Chillicothe, after the Tipton school ceases to exist. We do not see how it can be. The appropriation was for the Tipton School. We will assume that it ceases to exist on September 1st. By what possible line of reasoning could it be held that the remainder of the appropriation for the state training school at Tipton should be paid over to the state training school at Chillicothe? We do not see any such line of reasoning, nor do we see, as you suggest, how, after September 1st, the Chillicothe school could bill the Tipton school for any costs, because, the Tipton school, having ceased to exist, there is no one to bill.

It is well known that appropriations are earmarked for the particular object for which they are appropriated, and that there can be no deviation from the object.

Section 23 of Article IV of the Constitution of Missouri states:

"Fiscal year - limitations on appropriations- specification of amount and purpose.- The fiscal year of the state and all its agencies shall be the twelve months beginning on the first day of July in each year. The general assembly shall make appropriations for one or two fiscal years, and the 63rd General Assembly shall also make appropriations for the six months ending June 30, 1945. Every appropriation law shall distinctly specify the amount and purpose of the appropriation without reference to any other law to fix the amount or purpose."

Honorable W. E. Sears

Section 28 of Article IV states:

"Withdrawals from treasury--limitations on authority to incur obligations - certifications by comptroller and auditor - expiration of appropriations. - No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, nor shall any obligation for the payment of money be incurred unless the comptroller certifies it for payment and the state auditor certifies that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. At the time of issuance each such certification shall be entered on the general accounting books as an encumbrance on the appropriation. No appropriation shall confer authority to incur an obligation after the termination of the fiscal period to which it relates, and every appropriation shall expire six months after the end of the period for which made."

Your second question is thus stated by you: "As you know, the various counties pay a quarterly maintenance fee of \$15.00 per month to the various schools, based upon the individuals committed to our care. After the consolidation of the schools and until the next biennium, how shall this revenue be accredited and expended?"

In this respect, we direct your attention to Section 219.230 RSMo 1949, which reads:

"1. The board may transfer any child under its jurisdiction to any other institution for children, public or private, if after careful study of the child's needs, it is the judgment of the board that the transfer should be effected.

"2. The board may for the purpose of discipline, with the approval of the governor, transfer any person committed to its custody, to any state adult correctional institution. Any such person shall be subject in all respects to the discipline of the adult correctional institution to which he is transferred and shall be entitled to all of the rights provided for persons committed to such institution, except that no person committed to the board for an indeterminate period of time shall be confined in such adult correctional institution after reaching the age of twenty-one years. The board may,

Honorable W. E. Sears

after hearing, release any such person on parole with like effect and under the same circumstances as if he had remained in the custody of the board."

Also to Section 219.260 RSMo 1949, which reads:

"There shall be paid to the board of training schools by the county from which the child is committed the sum of fifteen dollars per month for the support, maintenance, clothing, and all other expenses of each child committed to the board, from the time of his reception by the board until his discharge; provided, that no payment shall be made for the time that any child may be absent from the school or other institution. All payments shall be made quarterly in advance in cash. In the event of a transfer of any child under the provisions of section 219.230, the board shall, on requisition of the institution or agency to whom custody of said child is transferred, pay to such agency or institution the amounts paid to it under this section and section 219.270 for the period of such transfer."

From the above it is clear that the \$15.00 per month now received for each inmate of the Tipton school should be paid to the Chillicothe institution after the inmates of the Tipton school have been moved to the state school at Chillicothe, since the \$15.00 follows the inmate.

CONCLUSION

It is the opinion of this department that any money appropriated for the state training school at Tipton should not be paid to the state training school at Chillicothe, after the transfer of the inmates of the Tipton school to the school at Chillicothe.

It is also the opinion of this department that the \$15.00 per month paid to the various schools by the county from which the inmate comes, should, after the transfer of the inmates of the Tipton school to the school at Chillicothe, be paid to the Chillicothe institution for each transferee from the Tipton School.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Very truly yours,

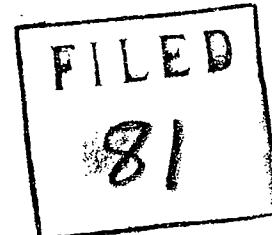
John M. Dalton
Attorney General

HPW/ld

ANIMALS:
DOGS: COONS:
COON ON A LOG:
BAITING OF ANIMALS:

"Coon on a Log" constitutes baiting in violation of Section 563.660 RSMo 1949.

June 12, 1956



Honorable D. W. Sherman, Jr.
Prosecuting Attorney
Lafayette County
Lexington, Missouri

Dear Sir:

In your recent request for an official opinion from this office, you ask:

"* * * I should like a written opinion as whether the following procedure is in violation of Section 563.660, and 563.670, Mo. R. S. for 1949.

"The procedure of these (Coon on the Log) trials are as follows:

"A live Coon with a collar and short length of chain is securely fastened to a large log which is anchored out in the water of a small pond or lake approximately 60 to 70 feet from shore line of the lake. The Raccoon is in plain sight of the dogs which are turned loose singly and each dog is given a set time to swim to the log and grab the Coon and pull him off the log into the water, this entails the dog grabbing the Coon with his teeth and the Coon also is fighting the dog to be kept from being pulled into the water. In the event the dog pulls the Coon into the water, they are then separated by the Judges who are standing close by in a boat. I believe it is possible for a Dog to possibly loose sight

Honorable D. W. Sherman, Jr.

of his eye or eyes, and it is also possible for the Raccoon to be permanently injured * * *."

Section 563.660 RSMo 1949 reads as follows:

"Any person who shall keep or use, or in any way be connected with or interested in the management of, or shall receive money for the admission of any person to, any place kept or used for the purpose of fighting or baiting any bull, bear, dog, cock or other creature, and any person who shall encourage, aid or assist or be present thereat, or who shall permit or suffer any place belonging to him or under his control to be so kept or used, shall, on conviction thereof, be guilty of a misdemeanor."

It is to be noted that this statute defines a crime in connection with "fighting or baiting any bull, bear, dog, cock or other creature." We have been unable to find any case exactly determining what is included in the meaning of the word "baiting"; however, Webster's New International Dictionary, 2nd Edition, defines "bait" (used as a verb) as follows:

- "1. To set on (a dog) to bite or worry.
2. To worry (an animal) by setting on dogs; esp., to harass or torment with dogs for sport; as, to bait a bear.
3. To set upon and worry by biting and tearing.
As chained bear whom cruel dogs
do bait. Spencer.
4. To persecute, harass, or torment."

(As an intransitive verb):

- "1. To attack as in worrying; harass."

Bouvier's Law Dictionary defines "bait" as "to attack with violence; to provoke and harass; to harass by the help of others, e.g. to bait a bear with mastiffs," and defines "baiting" as "to attack with violence; to provoke and harass." Likewise, Black's Law Dictionary, 3rd Edition, defines "bait" as "to attack with

Honorable D. W. Sherman, Jr.

violence; to provoke and harass" and defines "baiting" animals as:

"In English law. Procuring them to be worried by dogs."

These definitions of the words "bait" and "baiting" would seem to apply directly to the word "baiting" as used in the above statute and, although we have been unable to find any case construing said statute, it would appear that the procedures outlined by you as used in "Coon on a Log" would come within the prohibition of said statute.

Section 563.670 RSMo 1949 reads as follows:

"Every person who shall willfully and maliciously or cruelly kill, maim, wound, beat or torture any dumb animal, whether belonging to himself or another, shall upon conviction be punished by imprisonment in the county jail for not more than three months, or by a fine of fifty dollars or by both such fine and imprisonment; provided, that nothing herein contained shall be construed to prohibit or interfere with any scientific experiments or investigations; provided further, that nothing in this section shall apply to the hunting or trapping of wild animals."

It will be noted that this statute makes it a crime to kill, maim, wound, beat or torture any dumb animal, and thus, whether the practice of "Coon on a Log" would be a violation of this statute would depend upon the given facts of any case and the injury which might result to either dog or coon. All of the facts and circumstances surrounding each individual happening would have to be considered before it could be determined whether or not there was a violation of Section 563.670. It is clear that all examples of this practice would not be a violation of such statute, especially where no injury was done to either dog or coon, but it would likewise be possible that in some instances there might occur a violation of Section 563.670.

Honorable D. W. Sherman, Jr.

CONCLUSION.

It is therefore, on the basis of the foregoing, the opinion of this office that the practice known as "Coon on a Log" would be in violation of Section 563.660 RSMo 1949, and that, depending upon all of the circumstances, there might likewise be a violation of Section 563.670 RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Fred L. Howard.

Yours very truly,

John M. Dalton
Attorney General

FLH:sm

POLICEMEN:
"OFFICERS":
MERIT SYSTEM POLICE
DEPARTMENT:
RESIDENCE AND VOTING
REQUIREMENTS OF OFFICERS:

A chief of police under the Merit System Police Department is an officer under Section 77.400 RSMo 1949, and, consequently, would have to comply with the provisions of Section 77.380 RSMo 1949.



May 7, 1956

Honorable Bernard "Doc" Simcoe
Callaway County
Route 1
Fulton, Missouri

Dear Mr. Simcoe:

This will acknowledge receipt of your opinion request of April 26, 1956, which reads as follows:

"The City Attorney of Fulton, Missouri, Clyde Burch, has requested me to request an opinion pertaining to a problem concerning the City of Fulton.

"I am enclosing his letter which states the facts and the question. I would appreciate the opinion being written for me but at his request, as it is a controversial matter and I am only requesting it as a duty of mine."

The answer to the question raised would seem to depend upon whether the party who is to be appointed will be an officer within the contemplation of Section 77.400 RSMo 1949. If so, said party would have to meet the requirements of Section 77.380 RSMo 1949. Said sections read as follows:

"77.400. The term 'officer,' whenever used in this chapter, shall include any person holding any situation under the city government or any of its departments, with an annual salary, or for a definite term of office."

"77.380. All officers elected or appointed to offices under the city government shall be qualified voters under the laws and constitution of this state and the ordinances of the city, and, except the city sextons, must be residents of the

Honorable Bernard "Doc" Simcoe

city. No person shall be elected or appointed to any office who shall at the time he be in arrears for any unpaid city taxes, or forfeiture or defalcation in office."

Notice that the prospective appointee will be an "officer" if he holds office with an annual salary, or has a definite term of office. The facts in the opinion request state that said party will not be paid an annual salary. Section 77.440, Cum. Supp. 1955 is cited as authority. Without deciding whether or not Section 77.440, supra, is authority for the statement, let it suffice to say that it is a question of fact which cannot be determined by the opinion request. It is further stated in the opinion request that the prospective police chief will have no definite term of office. If that is a legal conclusion along with the conclusion that said party will not be paid on the basis of an annual salary, then there is no question presented. Said party would not be an officer under Section 77.400, supra, and thus would not have to comply with the requirements of Section 77.380, supra. However, this writer cannot agree with the conclusion that the prospective police chief will not have a definite term of office.

See Section 85.541, Cum. Supp. 1955, which reads as follows:

"Any city of the third class may by ordinance adopt a merit system police department. Such police department shall have a chief of police, and may have a deputy chief of police, and such number of regular policemen of such rank or grade as may be prescribed by ordinance.

"2. Any ordinance adopting the merit system police department within the meaning of sections 85.541 to 85.571 shall include the following provisions for the appointment, promotion, suspension, demotion or discharge of members of the police department:

(1) A personnel board shall be created which shall be composed of members of the largest and second largest political parties in equal numbers;

(2) The personnel board shall be required to give examinations to candidates for appointment or promotion and to certify lists of eligibles to the mayor or other appointing authority;

Honorable Bernard "Doc" Simcoe

(3) The mayor or other appointing authority shall be required to appoint or promote from a list of eligibles so certified;

(4) All persons so appointed or promoted shall be entitled to hold office during good behavior and efficient service;

(5) Any person suspended, demoted or discharged for misbehavior or inefficiency shall, upon his application, be granted a public hearing before the personnel board."

Notice that paragraph 4, subsection 2 of the section provides that "all persons so appointed or promoted shall be entitled to hold office during good behavior and efficient service." And then notice that a public hearing is provided for in the next and last paragraph. The courts, in determining the term of office under similar provisions, have almost universally grounded their decision upon whether the officer held his office subject to his own misconduct or whether he held office at the pleasure of the appointing party. If under the former conditions the prevailing view is that the party holds office for a fixed term; if he holds office under the latter conditions, it is for an indefinite term.

In the case of Shira vs. State, 119 N.E. 833, 187 Ind. 441, a statute provided that police officers "shall serve during good behavior." The police officers (relators) were dismissed upon the asserted ground that the board of police commissioners had decided to reduce the size and number of the police force in the interest of economy and efficiency. Such was found to be untrue--that the real reason for the order was to make room for friends of the commissioners. The court, in setting aside the order of the board and reinstating the relators, said at l.c. 834 of the N.E. Reporter:

"Appellants' next assertion is that the complaint, considered on its merits, does not state a cause of action, but we are unable to agree with this contention. The police department of the city of Marion, as the complaint shows, is governed by the provisions of section 9034a, Burns 1914,

Honorable Bernard "Doc" Simcoe

and its members, when appointed, 'shall serve during good behavior.' Their term of office is thus a fixed tenure within the meaning of the law (Roth v. State ex rel., 158 Ind. 242, 264, 63 N.E. 460), and as a general proposition they are not subject to be dismissed from the service except for cause and then after a hearing on proper notice. * * *

(Emphasis supplied.)

See also the case of State ex rel. Anderson vs. Fousek, 8 P. 2d 791, 91 Mont. 448, where the Supreme Court of Montana in a case involving the discharge of a policeman, stated at l.c. 793 of the P. Reporter:

"The term of office of a policeman is 'during good behavior, unless suspended or discharged as provided by law'. Section 2, C. 119, Laws of 1923. Tenure of office 'during good behavior' is for a fixed term * * *."

It appears from the case of McCartney vs. Poetting et al., 261 S.W. 2d 489, that Missouri will follow the prevailing view as the courts did in the above cited cases. In the McCartney case the St. Louis Court of Appeals, at l.c. 491, cited with approval the following general rule:

"Where the duration of the appointment of policeman is not fixed, they hold their office at the pleasure of the appointing power; and the appointment of a policeman is subject to the pleasure of the appointing power where such tenure is fixed by the express terms of the constitution, statute, or charter provisions. Under such provisions the term of the appointee is an indefinite one and is terminated by the appointment and qualification of his successor."

The inference from the language used by the court is that if the office is not terminable at the pleasure of the appointing power, then it is a definite term.

Honorable Bernard "Doc" Simcoe

That the prospective police chief will hold office subject to his own misconduct and inefficiency and not at the pleasure of the appointing power, is clear from a reading of paragraphs 4 and 5, subsection 2, Section 85.541, supra. This fact, of course, would bring him within the scope of the above cited cases unless the term, "definite term", as used in Section 77.400, supra, means something different than a "fixed term" as used by the courts in the cases cited. It appears to this writer that although the terms are not synonymous, the paragraph in question (paragraph 4, subsection 2, Section 84.541, supra) sets forth a definite term--that the courts have said "fixed term" in a sense which includes the meaning of "definite term." The word "definite" is defined in Webster's New International Dictionary, Second Edition, page 688, as "a thing defined or determined; a definite thing." It appears that the term of office has been defined in paragraph 4, subsection 2, Section 85.541, supra, and that the prospective police chief will be appointed for a definite term.

Another factor lending some support to the conclusion that a police chief under the merit system is an officer within the meaning of Section 77.400, supra, is Section 77.440, Cum. Supp. 1955, which reads in part as follows:

"* * * except as to personnel of a merit system police department whose salary schedules may be revised by the council upon recommendation of the personnel board, the salary of an officer shall not be changed during the time for which he was elected or appointed."

There would seem to be no reason for the exception by the Legislature unless as it manifestly appears from the section, it considered the personnel of a merit system police department as being officers.

CONCLUSION

It is therefore the opinion of this office that a chief of police under the merit system police department is an officer under Section 77.400, RSMo 1949, and, consequently, would have to comply with the provisions of Section 77.380, RSMo 1949.

Yours very truly,

JOHN M. DALTON
Attorney General

HLH/bf

COUNTY TREASURER:
ELECTION REQUIRE-
MENTS UPON A CHANGE
OF COUNTY CLASSI-
FICATION:



Notwithstanding the requirement in a class 2 county that a treasurer shall be elected in 1948 and every four years thereafter, the county treasurer in a class 2 county elected in 1954, when the county was a class 3 county, is entitled to hold office until the end of 1958 and until her successor is elected or appointed and qualified.

May 31, 1956

Honorable James S. Simrall, Jr.
Chairman
Clay County Board of Election Commissioners
National Commercial Bank Building
Liberty, Missouri

Dear Mr. Simrall:

Your recent request for an official opinion from this office was stated as follows:

"Mrs. Brooks, County Treasurer of Clay County, handed me the copy of the opinion dated April 27, 1948, directed to Virgil H. Black, the County Treasurer of Gallatin, Missouri, which you gave her at the meeting at Gladstone.

"After reading that opinion I still feel that we should have an opinion on the question of whether or not a County Treasurer should be elected this year for Clay County, it having been made a second class county since the election of Mrs. Brooks in 1954.

"Under Section 54.020, VA Mo. Statutes, 1949, it provides that counties of class 1 and 2 should elect a County Treasurer at the general election in 1948 and every four years thereafter. Mrs. Brooks, as above stated, was elected in 1954, and her commission as Treasurer was for a period of four years.

"In view of the question involved, I advised Mrs. Brooks to file before the closing of time for filing and have learned today that a candidate also filed on the Republican ticket. We would like to have an opinion on this question, and if necessary, I

Honorable James S. Simrall, Jr.

will be glad to have a request submitted to your office through Mr. Pratt, the Prosecuting Attorney in this county."

We enclose a copy of an opinion dated the eighteenth of February, 1954, to Honorable Walter H. Toberman, Secretary of State, which will be of great assistance in answering your questions.

The 1945 Constitution, Article VII, Section 12, states:

"Except as provided in this Constitution, and subject to the right of resignation, all officers shall hold office for the term thereof, and until their successors are duly elected or appointed and qualified."

The term for a county treasurer is four years; both in a class three county (Section 54.030) and in a class two county (54.020). Consequently, the change in classification did not change the length of the term. The incumbent elected in 1954 is entitled to hold the office for the full four years.

The question then arises: Who is entitled to the office when the present four year term expires? Certainly, there is no authority for an election in 1958 in a class two county. Under the constitutional authority, Article VII, Section 12, and Article IV, Section 4, which provides that:

"The governor shall fill all vacancies in public offices unless otherwise provided by law, and his appointees shall serve until their successors are duly elected or appointed and qualified,"
and

under the enabling statutes, Sections 105.030 and 54.020, the present incumbent will hold until the governor shall fill the office by appointment if a vacancy will occur at the end of this present four year term. We can find no law providing otherwise.

That we think a vacancy will occur, see the cases of State v. Clark, 87 Conn. 537; State v. Young, 68 So. 241, and Walsh v. People, 211 Pac. 646, cited on pages 4 and 5 of the above mentioned 1954 opinion. That we think Section 105.030 controls,

Honorable James S. Simrall, Jr.

and not 54.020 or 54.030, see the last two paragraphs before the conclusion of that opinion.

CONCLUSION

It is, consequently, our opinion that there can be no election of a county treasurer in Clay county in the year 1956; that the present incumbent will hold office until December 31, 1958, and until her successor is duly appointed and qualified between that date and the election of 1960.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Russell S. Noblet.

Very truly yours

John M. Dalton
Attorney General

RSN:lc

1 enclosure

CONSTRUCTION
OF SECTION
415.050
RSMo 1949:

No criminal prosecution will lie against a person, company, or corporation for using the word "storage" in their advertisements even though such person, company, or corporation is not engaged in the storage business and is not licensed as a warehouse.



July 25, 1956

Honorable Austin F. Shute
Assistant Prosecuting Attorney
Jackson County
415 East Twelfth Street
Kansas City, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"On 6-20-56 I requested an opinion from your office concerning the Warehouseman's Act. In answer thereto your office very promptly forwarded to me an opinion rendered to Douglas W. Greene, prosecuting attorney of Springfield, Missouri, dated 2-20-53. This opinion does not answer my problem.

"We have in Jackson County a firm not engaged in the storage business but uses the word 'storage' in its business title. The firm is actually engaged in the sale of furniture. The use of the word 'storage' is admittedly merely a 'come on,' making potential customers think they are going to get a bargain on unreclaimed stored furniture.

"In reading the Act, as per my last letter, I am interpreting it as prohibiting the use of the word 'storage' without complying with the Act even though the firm is not actually in the storage business. The problem has also arisen, Section 415.040, which is the penalty section, is meant to apply to Section 415.050. I feel personally that it is."

All references to statutory sections will be to Revised Statutes Missouri 1949 unless otherwise indicated.

Section 415.050 reads as follows:

Honorable Austin F. Shute

"It shall be unlawful for any person, firm, partnership, association or corporation required by this law to be licensed to hold himself, themselves, or itself out as a public warehouseman or warehousemen, or advertise for, or solicit business as a warehouseman without first complying with the provisions of this chapter; or to use the word 'storage' in any way in connection with the business unless engaged in the storage business and licensed as a warehouse as provided by this chapter."

This section clearly prohibits the use of the word "storage" in connection with any business that is not (a) engaged in the storage business and (b) which is not licensed as a warehouse. Any business using the word "storage" which was not in harmony with (a) and (b) would be in violation of Section 415.050, supra.

The above is perfectly plain but the penalty applicable for such violation is not, we believe, so clear. Chapter 415 contains two penalty sections. One is 415.110 which clearly states it is applicable only to a violation of Sections 415.060 to 415.130. Since the section which we are concerned with is Section 415.050 it is plain that this penalty section does not apply.

The penalty section about which you inquire is 415.040 which reads as follows:

"Any person or persons who shall transact within a city now having or which shall hereafter have a population of twenty-five thousand inhabitants or more, the business of storing for compensation or consideration other property than grain, without first procuring a license and giving a bond or legal liability insurance policy as herein provided, who shall continue to transact such business after such license has been revoked, or such bond may have become void or found insufficient security for the penal sum in which it is executed by the court approving the same (save only that he may

Honorable Austin F. Shute

be permitted to deliver property previously stored in such warehouse), shall be guilty of a misdemeanor, and upon conviction, be fined in a sum not less than one hundred dollars nor more than five hundred dollars for each and every day such business is carried on; and the court that issued may refuse to renew any license, or grant a new one, to any person whose license has been revoked, within one year from the time same was revoked."

It seems clear to us that this section does not apply to 415.050 because it states that it is applicable to those persons who shall transact within a city the business of storing for compensation property without first procuring a license to do so, or who shall transact such business after the license which they have procured has expired. Since you state that the businesses in question are not engaged in the storage business this section would not apply to them.

Our situation therefore is that there is no penalty in Chapter 415 which would apply to a violation of Section 415.050. Neither do we know of any general law which could be made applicable in this situation. Section 415.050 simply states that its violation shall be "unlawful" but it does not say whether such unlawfulness shall be a felony or a misdemeanor. In view of these facts we do not believe that any criminal prosecution will lie against a person, company, or corporation for using the word "storage" in their advertisements even though such person, company, or corporation is not engaged in the storage business and is not licensed as a warehouse.

CONCLUSION

It is the opinion of this department that no criminal prosecution will lie against a person, company, or corporation for using the word "storage" in their advertisements even though such person, company, or corporation is not engaged in the storage business and is not licensed as a warehouse.

The foregoing opinion, which I hereby approve, was prepared

Honorable Austin F. Shute

by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW:lc

CIVIL DEFENSE: Volunteer workers in civil defense not
"employees" within meaning of Workmen's
WORKMEN'S COMPENSATION: Compensation law.



May 7, 1956

Mr. Marvin W. Smith
Director, Civil Defense Agency
Jefferson Building
Jefferson City, Missouri

Dear Mr. Smith:

This is in response to your letter of March 6, 1956, wherein you have requested assistance in answering certain questions submitted to you by Capt. Henry C. Barnes, Commander, 4715th Ground Observer Squadron, Joplin Air Defense Filter Center.

Capt. Barnes' letter, which you have enclosed, is primarily concerned with the Missouri Workmen's Compensation Act and its application to volunteer workers at the Filter Center. We deem it necessary for this office to answer only the following two questions contained therein:

"2. Are the volunteer workers of the Civil Defense Agency of Missouri at the Joplin Filter Center and the Ground Observation Posts considered to be 'employees' of the Civil Defense Agency within the meaning of the Missouri Workmen's Compensation Act?

"3. Are such employees covered employees to whom the Act does apply?"

The word "employee" is defined in the Workmen's Compensation law as follows:

"The word 'employee' as used in this chapter shall be construed to mean every person in the service of any employer, as defined in this chapter, under any contract of hire, express or implied, oral or written, or under any appointment or election. * * *"

Mr. Marvin W. Smith

We have not been able to find any Missouri cases passing directly upon this precise question. The best discussion of this problem generally, however, is found in Larson's Workmen's Compensation Law, Volume 1, Sections 47.10, 47.41, 47.41(a), pages 687 and 696, as follows:

Sec. 47.10.

"Up to this point, the discussion of status has shown that the compensation 'employee' concept has expanded beyond the common-law 'servant' concept in its actual application. There is, however, one respect in which the compensation concept is narrower than that of the common law; most acts insist upon the existence of a 'contract of hire, express or implied,' as an essential feature of the employment relation. At common law, it is perfectly possible to strike up a master-servant relation without a contract, so far as vicarious liability is concerned. An infant, a prisoner, a slave, a helpful house guest - all might impose vicarious liability on one who accepted their services performed subject to the master's control.

"The reason for the difference between the two concepts is readily explained by the difference between the nature of the two liabilities involved. The end product of a vicarious liability case is not an adjustment of rights between employer and employee on the strength of their mutual arrangement, but a unilateral liability of the master to a stranger. The sole concern of the vicarious liability rule, then, is with the master: did he accept and control the service that led to the stranger's injury? If he did, it is of no particular importance between him and the stranger whether the servant enjoyed any reciprocal or contractual rights vis-a-vis the master. Accordingly, the Restatement of Agency says plainly that the master must consent to the service, but nowhere requires that the servant consent to serve the master or even know who he is.

"Compensation law, however, is a mutual arrangement between the employer and employee under

Mr. Marvin W. Smith

which both give up and gain certain things. Since the rights to be adjusted are reciprocal rights between employer and employee, it is not only logical but mandatory to resort to the agreement between them to discover their relationship. To thrust upon a worker an employee status to which he has never consented would not ordinarily harm him in a vicarious liability suit by a stranger against his employer, but it might well deprive him of valuable rights under the compensation act, notably the right to sue his own employer for common-law damages.

"There is also a sound reason for the requirement that the employment be 'for hire'. In a vicarious liability suit, payment is not a requisite of servant status, since the stranger's rights against the master could not possibly be affected by the presence or absence of financial arrangements between the master and servant. But in a compensation case, the entire philosophy of the legislation assumes that the worker is in a gainful occupation at the time of injury. The essence of compensation protection is the restoration of a part of the loss of wages which are assumed to have existed. Merely as a practical matter, it would be impossible to calculate compensation benefits for a purely gratuitous worker, since benefits are ordinarily calculated on the basis of earnings.

"These, then, are the underlying reasons why compensation acts usually insist upon a contract of hire. They should be borne in mind during the consideration of the particular applications of the contract requirement which follow, with a view to distinguishing legitimate uses of the requirement from purely technical applications having nothing to do with the reason or spirit of the rule."

Sec. 47.41.

"The word 'hire' connotes payment of some kind. By contrast with the common law of master and servant, which recognized the possibility of having a gratuitous servant, the

Mr. Marvin W. Smith

compensation decisions uniformly exclude from the definition of 'employee' workers who neither receive nor expect to receive any kind of pay for their services.

"Although, as the next sub-paragraph will show, the performance and acceptance of valuable service normally raises an implication that payment for the services is expected, this implication does not arise when the circumstances negative such an expectation. This occurs in at least three common situations."

Sec. 47.41(a)

"The performance of voluntary patriotic or charitable duties ordinarily leads to no presumption of expected payment. A professional dancer and radio artist volunteered to act as a hostess at a service men's canteen. An irrepressible marine, with whom she had consented to dance, took a firm grip on her arm, in the process of unfolding a complex jitterbug routine, and threw her spinning through the air, evidently expecting to catch her. He omitted to do so, however, having himself in the meantime hit a table, and the hostess fell to the floor, sustaining injuries. The court, in an opinion containing a good collection of the authorities in the field, held that she was not an employee under the Compensation Act, and was therefore not barred by the exclusive remedy clause of the Act from bringing a damage suit against the Canteen based on its failure to protect her from boisterous and disorderly persons. A similar result has been reached as to a carpenter injured while donating his services to the Red Cross, a person volunteering to act as a guard during a liberty bond drive, a school teacher assisting in the issuance of war ration books, a member donating his services in the construction of a grange hall, and a person voluntarily participating in a carnival for prospective students of a university."

Based upon the reasoning in the above text authority, we are therefore of the opinion that volunteer workers of the Civil

Mr. Marvin W. Smith

Defense Agency of Missouri in the Joplin Filter Center and the Ground Observation Posts are not "employees" of the Civil Defense Agency within the meaning of the Workmen's Compensation law and, hence, are not included within its coverage.

CONCLUSION

It is the opinion of this office that volunteer workers of the Civil Defense Agency of the State of Missouri at the Joplin Filter Center and the Ground Observation Posts are not "employees" of the Civil Defense Agency within the meaning of the Workmen's Compensation law and, hence, are not included within its coverage.

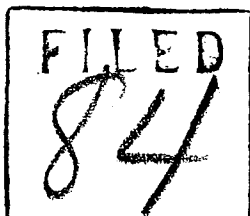
The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml

PROBATE COURT: In specifying the date in a notice for hearing
PUBLICATION OF on petition for sale by probate court, the date
NOTICE: must be fixed not later than seven days after
twenty-eight days following the date of the
first publication of notice.



June 11, 1956

Honorable O. L. Spencer
Judge of the Probate Court
Scott County
Benton, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"Section 473.493 of the New Probate Code is so confusing to me that I can't decide what to do. Will you furnish me an opinion to guide me in my dilemma?"

"This statute provides, among other things, 'Publication, if any, shall be for four consecutive weeks in accordance with Section 472.100. Where service by publication is ordered, the hearing shall be held at the time specified in the notice which shall be not later than 7 days after completion of publication,' etc.

"Norton vs. Reed, 253 Mo. Page 236 and Young vs. Downey, 145 Mo. Page 250 seems to hold that, where statute requires publication be for four consecutive weeks, it means 28 days, that is, the completion of the publication is 28 days after the first publication. Then City of Brunswick vs. Beneche, 233 SW Page 169, where the statute considered required publication of notice be published in the paper for two consecutive weeks, the court ruled that the publication required was for full two weeks or 14 days.

"Question:- In specifying date in notice for hearing on petition for sale, must I fix the date not later than 7 days after the last publication or not later than 7 days after 28 days from first publication?"

Honorable O. L. Spencer

Paragraph 2 of Section 473.493, 1955 Missouri Probate Code, reads in part as follows:

" * * * Publication, if any, shall be for four consecutive weeks in accordance with section 472.100, RSMo. Where service by publication is ordered, the hearing shall be held at the time specified in the notice which shall be not later than seven days after completion of publication and, in other cases, the hearing shall be had at the time specified in the notice but not later than twenty days after date of the notice."

In the case of Ratliff v. Magee, 169 Mo. 461, at l.c. 467, the Missouri Supreme Court stated:

"In Young v. Downey, 145 Mo. 250 (same case on second appeal, 150 Mo. 317), the statute construed was that requiring notice to heirs when land was to be sold by the administrator to pay debts. The requirement of that statute is: 'Such notice shall be published for four weeks in some newspaper in the county in which the proceedings are had . . . before the term of the court at which any such order will be made.' [Sec. 148, R.S. 1899.] There the law does not call for a publication once a week for four weeks successively, but it calls for a publication of the notice for a period of four weeks. In that case the notice had been published once a week during four successive weeks, but the first publication was September 8, and the first day of the term of court to which it was returnable was October 2, so that a period of only twenty-five days from first to last was covered by the notice and we held that the statute was not satisfied, that there must be full four weeks notice and that four weeks covered twenty-eight days. But we did not hold that the statute required a space of four weeks between the

Honorable O. L. Spencer

day of the last publication and the first day of the term of the court."

In the case of Norton v. Reed, 253 Mo. 236, at l.c. 249, the court stated:

"The notice was published with the addition of the description of the tract of land involved in this suit. The statute (R.S.1889, sec. 147) required it to 'be published for four weeks in some newspaper in the county in which the proceedings are had, or by ten handbills, to be put up at ten public places in said county at least twenty days before the term of the court at which any such order will be made, in the discretion of the court.' "

At 250 et seq. the court stated:

"That the period of four weeks that the statute required this notice to be published was a full period of twenty-eight days is not only evident from the words themselves by the application of their ordinary and usual meaning in such connection, but has been permanently settled by the adjudications of this court. [Young v. Downey, 145 Mo. 250, 254, 259; same case, 150 Mo. 317; Robbins v. Boulware, 190 Mo. 33.] That the notice is an indispensable prerequisite to the jurisdiction of the court to make the order of sale is equally well settled in the same cases. The Young case is not distinguishable in any particular from the one we are considering. In that case the order of sale recited that the notice had been published according to law. The proof of publication shows that there had been insertions of the notice in a weekly newspaper published in the county, that is to say, on September 8th, 15th, 22nd and 29th. The first day of

Honorable O. L. Spencer

the next term was October 2d, so that the same number of days and the same number of weekly publications intervened in that case as in this, yet the court decided that on account of the defective publication in that respect the order of sale and deed made in pursuance of it were void. On the second appeal reported in the 150th Missouri the attention of the court was called to the fact that it had decided differently in *Cruzen v. Stephens*, 123 Mo. 337, and after a full review of many cases both in this and other States, it expressly overruled that case."

In view of these opinions, it is the opinion of this department that the hearing date should be set not more than seven days after the elapse of a twenty-eight day period following the date of the first publication.

CONCLUSION

It is the opinion of this department that in specifying the date in a notice for hearing on petition for sale by probate court that the date must be fixed not later than seven days after twenty-eight days following the date of the first publication of notice.

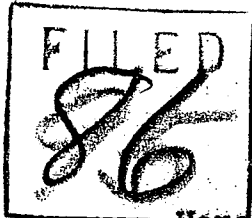
The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours

John M. Dalton
Attorney General

HPW:ld:lc

PROBATE COURTS: Sec. 472.040 RSMo 1949, Cum. Supp. 1955 prescribes rules for taxing costs in probate proceedings. Costs properly taxed against estate with insufficient funds not collectible. Fees taxable under Sec. 483.580 RSMo 1949 in counties of less than 30,000 inhabitants and remaining unpaid for one year after being reported under said statute are to be collected by State Director of Revenue. Fees accruing under Sec. 483.580 RSMo 1949 are to be collected from estate or from persons requiring services named in statute. Failure of executors and administrators to pay costs properly taxed necessitates looking to official bonds for collection.



This is filed

June 21, 1956

B. H. Stone

under the name of Stone as per original opinion request.

STONE

Honorable Edward C. Westhouse
Judge of the Probate Court
Madison County
Fredericktown, Missouri

Dear Judge Westhouse:

The following opinion is rendered at the request of Honorable B. H. Stone, Member of the Missouri House of Representatives, and is directed to your three inquiries as follows:

"1. Suppose a Will is deposited in the Probate Court for probate, a Commission to take proof of Will is issued to a notary public in another county of Missouri, the notary public returns the Commission with proof of Will along with his fees, witnesses' fees, sheriff's fees, etc., and the Will is admitted to probate and recorded or the Will is denied probate. If nothing further is done because there is no estate, who can be charged with the fees listed in Section 483.580, RSMo., 1949 and with the other fees of the notary, witnesses, sheriff, etc? Furthermore, if a voluntary collection is impossible, what methods can be used in attempting an involuntary collection by the court?

"2. Suppose the above is done with the further facts that Letters Testamentary are requested and granted, publication is made of the notice of the granting of Letters, witnesses and appraisers are appointed, but not until the witnesses and appraisers perform their duty is it realized that there is no estate. Who can be charged with the fees listed in Section 483.580 RSMo., 1949 and what methods can be used in attempting an involuntary collection?

Honorable Edward C. Westhouse

Furthermore, who can be charged, no voluntary payment having been made to those entitled, with the fees of the notary, witnesses and sheriff and with the cost of publication and compensation, travel and other expenses of the appraisers (witnesses and appraisers of the Inventory) and what methods can be used in attempting an involuntary collection by the court?

"3. Suppose all of the above except the deceased did have sufficient property at the time of his death to pay all costs; fees and expenses of administration; but the executors refuse to pay the costs because they have either mismanaged the estate so that nothing remains or maintain the costs are too high. Assuming that the costs are correctly stated, who can be charged with the costs and what methods can be used in attempting an involuntary collection by the court, judge or clerk?"

Section 483.580 RSMo 1949 is the general statute disclosing what fees are to be charged and collected in probate proceedings. Subparagraph 1 of Section 483.580 RSMo 1949, provides, in part:

"1. In the probate proceedings in the different probate courts in this state, there shall be charged against and collected from the estates or parties requiring the services of the probate judge, clerk or court, fees as follows: * * *" (Emphasis supplied.)

The underscored language in the above quotation discloses that in some instances the estate will be charged with the fees, and in other cases the parties requiring the services will be charged. Numerous services are outlined in Section 483.580 RSMo 1949, and it is reasonable to conclude that only in those instances where the service is rendered as a direct aid to the actual administration of an estate while the estate is in process of administration is it proper to charge the estate with the fees for statutory services. In other instances where fees for designated services are chargeable they should be charged to the persons requesting the services.

Investigation discloses that Madison County is a county of the Fourth Class with a population under thirty thousand inhabitants. Subparagraph 3 of Section 483.580 RSMo 1949, when alluding

Honorable Edward C. Westhouse

to counties of less than thirty thousand inhabitants provides, in part, as follows:

"Each judge or clerk of the court shall, within thirty days after the expiration of each calendar year file with the director of revenue a written report, verified by his affidavit specifying the name and court number of each estate in which fees accrued in his court in such calendar year, and the amount of fees unpaid and due in each estate at the end of such year. Such judge or clerk of the court shall also specify in said written report to the director of revenue all fees which have been due and unpaid for more than one year, the amounts thereof and the name of the estate in which the same are due, which report shall be verified by affidavit of the judge or clerk of the court that he has been unable after the exercise of diligence to collect the same; and it shall thereupon be the duty of the director of revenue to cause the same to be collected by law and turned over to the state treasurer." (Emphasis supplied.)

The underscored language in the above extract from subparagraph 3 of Section 483.580 RSMo 1949 places the duty on the State Director of Revenue to collect by law those fees properly charged under said statute and which have been reported unpaid for more than one year in counties of less than thirty thousand inhabitants.

f Section 472.040 RSMo 1949, Cumulative Supplement, 1955 (L. 1955, H.B. 30, Sec. 5) of Missouri's new probate code is a general statute dealing with costs in proceedings in the probate court, and provides:

"In all suits and other proceedings in the probate court, the party prevailing shall recover his costs against the other party, except in those cases in which a different provision is made by law. Whenever costs are given against executors and administrators, the estate shall pay the costs.

Honorable Edward C. Westhouse

Parties presenting claims against estates, for the same causes and in the same manner, may be ruled to give security for costs, as is provided in practice in civil cases."

Section 472.040, just quoted above, covers adversary proceedings, actions to enforce claims against the estate, and ex parte proceedings. "Other proceedings" referred to in the statute may be as varied in character as are the services to be rendered by the court or clerk under the outline of services found in Section 483.580 RSMo 1949. Absent consideration of adversary proceedings or proceedings to establish claims against the estate, or cases where a different provision is made by law, the probate court, in taxing fees required to be charged by Section 483.580 RSMo 1949, should tax the same against the party or parties requiring the service.

We next consider the collection of costs which have been assessed against an estate in which there are not sufficient assets to defray such costs. The following rule is quoted from Ex Parte Nelson, 253 Mo. 627, l.c. 628:

"At the common law no costs were recoverable. * * Costs in Missouri being, therefore, purely creatures of the statute, enactments in relation thereto must be strictly construed."

No statute has been found directing how costs in the probate court are to be collected when assessed against an estate which is without funds, and in the absence of such a statute the costs are not collectible. This is a subject to which the attention of the probate judge should be directed in the earliest stages of administration, and it is difficult to see how such a situation can arise, or even become acute, if the probate judge exercises close supervision over estates being administered under his jurisdiction.

In directing remarks to the first two specific inquiries quoted in the forepart of this opinion it should be observed that those persons who seek to establish a will and probate the same are interested in the devolution of property described in the will, and administration of the estate with its consequent costs may or may not be required by law. In those cases where the probable value of the estate described in the will is not comparable to the probable costs of administration, such fact should be evident to the probate court at the time the will is presented for probate, and the fees for services to be rendered by the probate court and described in Section 483.580 RSMo 1949 preliminary to full administration on the estate should be taxed against the persons

Honorable Edward C. Westhouse

requiring such services. If, at a later date it is ascertained that full administration is required by law and that the estate will support costs properly taxable against the estate, a re-taxing of costs would be in order. The third inquiry involves an allegation of misconduct on the part of administrators or executors who refuse to pay costs properly taxed. In such instances it will be necessary for the official charged with collecting delinquent fees to look to the official bond of the administrators and executors.

CONCLUSION

It is the opinion of this office that fees in probate proceedings are to be taxed according to rules laid down in Section 472.040 RSMo 1949, Cumulative Supplement, 1955 (L. 1955, H.B. 30, Sec. 5); that costs properly taxed against an estate without funds to meet such costs are not collectible; that fees taxable under Section 483.580 RSMo 1949 in counties of less than thirty thousand inhabitants, and remaining unpaid for one year after being reported under said statute are to be collected by the State Director of Revenue; that fees accruing under Section 483.580 RSMo 1949 are to be collected from the estate or from parties requiring services set out in the statute; and that failure of executors and administrators to pay costs properly taxed will necessitate looking to the official bonds of such executors and administrators for collection.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO:M:hm

COUNTIES:
COUNTY COURT:
DISPOSAL AREAS:

County Court may not rescind order entered under
Section 64.483, making County Option Dumping Ground
Law operative within its county.



October 3, 1956

Honorable H. K. Stumberg
Prosecuting Attorney
St. Charles County
St. Charles, Missouri

Dear Mr. Stumberg:

This is in response to your request for an opinion dated
August 13, 1956, which reads as follows:

"Please be advised that on the 12th day of March, 1956, the County Court of St. Charles County, Missouri, after notice and hearing by order of record made Sections 64.460 to 64.487 VAMS operative in St. Charles County, Missouri. Since that date the County Court has been requested to rescind its order of March 12th making these sections operative. I have given the Court my opinion to the effect that there is no provision in the act itself which provides for making a section inoperative once it has been made operative and in this connection my opinion was based not only on the statute itself, but on the decisions rendered in Mead vs Jasper County 266 SW 467 and State ex rel Rosenthal vs Smiling 263 SW 825. The County Court is not satisfied with the opinion which I have rendered and I have been asked to obtain your official opinion as to whether or not there is any manner in which this act can be made inoperative in St. Charles County. In this connection, I would like to call to your attention that the Term of Court in which the original order was made has terminated and we are now in a new term of Court.

"I will appreciate your opinion in this matter."

Section 7 of Article VI, Constitution of Missouri 1945, provides that in a county not framing and adopting its own charter

Honorable H. K. Stumberg

or adopting an alternative form of county government, there shall be elected a county court of three members which shall manage all county business as prescribed by law. County Courts are no longer courts in a juridical sense but are merely ministerial bodies managing the county's business. State ex rel. Kowats v. Arnold, 356 Mo. 661, 204 S.W. 2d 254, 258.

It has also been held on numerous occasions that a county court is only the agent of the county with no powers except those granted and limited by law and, like other agents, it must pursue its authority and act within the scope of its powers. Bradford v. Phelps County, Mo. Sup., 210 S.W. 2d 996, 999.

Sections 64.460 - 64.480, RSMo. Cum. Supp. 1955, enacted by the 68th General Assembly, provide for the regulation and licensing of disposal areas but Section 64.483 stipulates that "Sections 64.460 - 64.487 shall not be operative in any county until the county court, after notice and hearing, by order entered of record, so orders."

You have informed us that the county court has so ordered and we presume regularity in the notice, hearing and order. The sole question is whether the court now has the authority to rescind its order and make the above sections again inoperative in St. Charles County.

You have also cited us to two cases which we deem to be in point and determinative of the question.

In State ex rel. Rosenthal v. Smiley, 304 Mo. 549, 263 S.W. 825, the legislature had created the office of county counselor in counties having a population of over 100,000 but vested the county court with the discretion of determining whether in each county of that class those statutes creating the office should become effective. The court ordered the appointment of a county counselor and subsequently sought to rescind that order and to declare the office vacant. The Supreme Court said at Southwestern l.c. 827:

"* * * The statute itself creates the office, potentially, to come into actuality upon the happening of a future contingency; namely, the exercise of the power of appointment conferred by it upon the county court. State v. Wilcox, 45 Mo. 458, 464. When, therefore, the county court, on December 1, 1922, appointed Kiskaddon, the office of county counselor of St. Louis County came into existence, as a fixed and established county office. Thereafter the only power or duty that the county court had with respect to it was to fill it by appointment whenever it became vacant. The discretion with which the court was invested under

Honorable H. K. Stumberg

the statute to determine in the first instance whether the public interest required the appointment of a county counselor was exhausted by its first appointment. * * *

The other case you have cited, Mead v. Jasper County, 305 Mo. 476, 266 S.W. 467, is to the same effect. As in the Mead case, we need not determine whether the court could have rescinded this order within the same term it was entered and before any rights accrued thereunder because that is not our factual situation.

Since the statute in question, Section 64.483, supra, merely vests the county court with the discretion to determine in the first instance whether Sections 64.460 - 64.487, RSMo. Cum. Supp. 1955, shall become operative in its county, we are of the opinion that once it has made that determination and after notice and hearing by order entered of record orders that these sections become operative, it has exhausted its authority and cannot in a subsequent term of court rescind that order.

CONCLUSION

It is the opinion of this office that once a county court, after notice and hearing, has by order entered of record ordered that Sections 64.460 - 64.487, RSMo. Cum. Supp. 1955, be operative in its county, it may not at a subsequent term of court rescind that order and thereby make such sections inoperative within the county.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

John M. Dalton
Attorney General

JWI/b1

PROBATE CODE:

EXECUTORS AND ADMINISTRATORS:

EMPLOYMENT OF ATTORNEY:

Effect of new probate code law as to
attorneys and executors or administrators
in the administration of an estate.



April 23, 1956

Honorable Lee C. Sutton
Member, House of Representatives
Sixty-Eighth General Assembly
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your opinion request of
March 27, 1956, a copy of which is set out as follows:

"A serious question has arisen as to whether
or not section 473.153, RSMo 1955 Supplement
(Section 73 of House Bill No. 30, 1955 General
Assembly) prevents an executor or administrator
from applying for letters in the Probate Court,
managing an estate and filing inventories and
settlements without employing an attorney. I
have been advised that the employment of an
attorney is no more necessary under this pro-
vision than it was under Section 484.030, RSMo
1949.

"I wish to request your opinion, therefore, as
to whether or not an executor or administrator
is required to employ an attorney in connection
with the administration of an estate where con-
troversies do not arise."

In answering your question, certain statutes should be in-
spected.

Section 465.100, RSMo 1949 reads as follows:

"1. In all settlements of executors or adminis-
trators the court shall settle the same accord-
ing to law, allow all disbursements and appro-
priations made by order of the court, and all
reasonable charges for funeral expenses, leas-
ing real estate, legal advice and service, and
collecting and preserving the estate, also a
reasonable cost for a surety company bond, if
the court deems it just and proper under all

Honorable Lee C. Sutton

the circumstances connected with the estate to allow cost of such bond, and as full compensation for their services and trouble a commission of five per cent, on personal property and on money arising from the sale of real estate; and that a surviving partner or partners, in administering upon the effects of the copartnership, shall be allowed a commission of three per cent on the interest of the deceased partner for like services and trouble.

"2. Provided, that whenever the executor or administrator dies, resigns or is incapacitated during the time he is acting as an executor or administrator, and before he is finally discharged from his duties by the probate court, and before any final distribution has been made of the assets of the estate the probate judge may allow compensation based upon the proportionate part of the services and trouble rendered for the period of time such deceased, resigned or incapacitated executor or administrator actually served as such executor or administrator, and provided that such compensation for services rendered by the deceased, resigned or incapacitated executor or administrator and that of the executor or administrator who completes the work as such executor or administrator shall not exceed a commission of five per cent on personal property and all money arising from the sale of real estate."

Section 484.030, RSMo 1949 reads as follows:

"1. No person whomsoever shall practice in the probate court, it being a court of record, other than a regular, licensed, practicing and reputable attorney, so authorized in this state; and no person shall receive any pay nor compensation for any legal service, for making settlements, annual or final, filing petitions or other documents in any estate, other than such regularly licensed attorney, and no probate court shall allow nor permit any pay or fee for any such services to any person, to be taxed, in any estate, other than to a reputable attorney, either directly or indirectly, for any purpose. Nor shall any administrator or executor or guardian employ or pay to any such person other than an attorney.

Honorable Lee C. Sutton

"2. The probate court shall not allow any unreasonable, excessive or unjust fee or compensation to be taxed to any attorney, in any estate, and in no case shall such court allow any fee whatever when the work, service or device done or performed or given by any attorney is wrong, improper or injurious to the estate. Any person whomsoever practicing, charging or receiving fees in the probate court without being an attorney as herein required shall be guilty of a misdemeanor and upon a conviction shall be punished by a fine of not less than ten dollars nor more than one hundred dollars, or by imprisonment not to exceed thirty days in the county jail or by both such fine and imprisonment; provided, nothing in this section shall be so construed as to prevent any executor, administrator or guardian from making their own settlements and management of their estates if in the opinion of the court entered of record such persons are capable of so doing and the estate will not be injured thereby but be legally and properly administered."

The new section replacing Sections 465.100 and 484.030 is Section 473.153, Cum. Supp. 1955, which is a part of the new probate code of Missouri and reads as follows:

"1. If a testator by will makes provision for the compensation of his executor or administrator, that shall be allowed and taken as his full compensation unless he files in the court a written instrument renouncing all claim for the compensation provided by the will before qualifying as executor or administrator. When no compensation is provided in the will, or when there is no will, or when the executor or administrator renounces all claim to the compensation provided in the will, the compensation of the executor or administrator shall be determined pursuant to this section. When there is only one executor or administrator he shall be allowed as the minimum compensation for his services the following percentages of the value of the personal property administered and of the proceeds of all real property sold under order of the probate court.

Honorable Lee C. Sutton

On the first.....\$	5,000,	5	per cent;
On the next.....	20,000,	4	per cent;
On the next.....	75,000,	3	per cent;
On the next.....	300,000,	2 3/4	per cent;
On the next.....	600,000,	2 1/2	per cent;
On all over.....	1,000,000,	2	per cent.

In any case where reasonable compensation to the executor or administrator is in excess of the minimum provided in the above schedule, the court shall allow such additional compensation as will make the compensation of the executor or administrator reasonable and adequate. Performance by the executor or administrator of extraordinary services is not necessary to entitle him to such additional compensation. Such percentages shall be computed on the value of the personal property at the time of disbursement or distribution thereof, except that where it is necessary to allow compensation before the property is disbursed or distributed, or to allow compensation to an executor or administrator who has been succeeded by another executor or administrator, the court may determine the fair market value of property at the time of making the allowance and base such percentage thereon.

"2. When there are two or more joint or successor executors or administrators they shall be allowed in the aggregate reasonable compensation for their services, not exceeding twice the minimum provided for in the schedule set forth in subsection 1 or five per cent of the value of the personal property administered and of the proceeds of the real property sold under order of the probate court, whichever is less, except that this maximum limitation shall not apply if possession has been taken of real property pursuant to order of the probate court but such real property has not been sold under order of the probate court, or if extraordinary services have been performed. Where there are two or more joint or successor executors or administrators the compensation allowed them shall be apportioned among them by the court according to the services actually rendered by each, or as they may agree.

"3. Attorneys performing services for the estate at the instance of the executor or administrator shall be allowed out of the estate as the minimum compensation for their services sums equal to the percentages set forth in the schedule contained in

Honorable Lee C. Sutton

subsection 1. In any case where reasonable compensation to the attorneys is in excess of the minimum provided in the schedule the court shall allow such additional compensation as will make the compensation of the attorneys reasonable and adequate. Performance by the attorneys of extraordinary services is not necessary to entitle them to such additional compensation. If the executor or administrator is an attorney, no allowance shall be made for legal services performed by him or at his instance unless such services are authorized by the will or by order of the court or are consented to by all heirs and devisees whose rights may be adversely affected by the allowance.

"4. Compensation properly allowable hereunder may be allowed to executors, administrators or attorneys upon final settlement, or partial compensation upon application therefor, at any time or times during administration. If the court finds that an executor or administrator has failed to discharge his duties as such in any respect it may deny him any compensation whatsoever or may reduce the compensation which would otherwise be allowed. If the court finds that any attorney's services or actions in connections therewith are wrong, improper or injurious to the estate, no attorney fee whatever shall be allowed.

"5. No executor or administrator, other than one who is an attorney, may appear in court except by attorney, and such attorney may not be a salaried employee of the executor or administrator, but when the executor or administrator is an attorney, nothing herein shall prevent his being represented in court by a partner, associate or employee who is an attorney. Any executor or administrator may prepare and file his own inventories and settlements."

Under subsection 5 of the latter section (473.153, supra) no executor or administrator may appear in court unless he is an attorney. This would indicate that when the executor or administrator is not an attorney then he must employ one before making an appearance in court. It is provided in the same subsection that any executor or administrator may prepare and file his own inventories

Honorable Lee C. Sutton

and settlements. The intention of the Legislature, it seems, is to require an executor or administrator who is not an attorney to employ an attorney when an appearance in court is to be made. The last sentence in the subsection sets out specifically two instances which are not intended to constitute an appearance in court.

CONCLUSION

It is, therefore, the opinion of this office that, the Legislature having prescribed the method of administration of an estate and the rules and regulations to be observed in relation thereto-- "that no executor or administrator, unless he is an attorney, may appear in court except by attorney," and "that any executor or administrator may prepare and file his own inventories and settlements," we are bound to follow, and may not prescribe a practice in contravention to, the provisions as enacted by the Legislature.

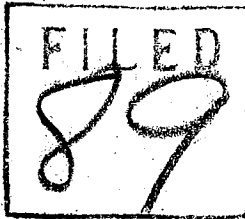
Yours very truly,

JOHN M. DALTON
Attorney General

HLH/b1

SECRETARY OF STATE:
POWER OF SECRETARY
OF STATE:
FLAG OF MISSOURI:
GREAT SEAL OF MISSOURI:

The Secretary of State of Missouri does not have the authority to grant permission for the use of the Flag or Great Seal of Missouri to any of the following: (1) Private firms for commercial purposes (2) Fraternal, benevolent and other nonprofit organizations for noncommercial purposes (3) Candidates for political office.



February 23, 1956

Honorable Walter H. Toberman
Secretary of State
Jefferson City, Missouri

Dear Mr. Toberman:

This will acknowledge receipt of your request of recent date in which you ask the following:

"Will you please advise this office regarding the commercial use of the Great Seal and the Missouri State Flag. Specifically, we at present have a request from Snyder and Black of New York, asking us if the firm can use the flag for advertising purposes, and we also have another recent request from E. T. Nash Merchandise Company of New York, asking for permission to use the Great Seal on a serving tray to be placed on the market in the near future.

"Although Section 10.080, R. S. Mo., 1949, states the original copy of the flag's design shall be kept in the office of the secretary of state, does this mean we are the custodian of the flag, and therefore, can grant permission for its use for commercial purposes?

"This office is cognizant of the fact the secretary of state is custodian of the great seal of the State of Missouri, but in the opinion of the attorney general, may we grant commercial use of the seal to:

- 1.- Private firms for commercial purposes.
- 2.- Fraternal, benevolent and other nonprofit organizations for noncommercial purposes.
- 3.- Candidates for political office.

"We will appreciate your opinion in these matters and sincerely hope you will call upon us if any further information is desired."

It is the opinion of this writer that the Secretary of State does not possess the authority to issue a license for use of the Flag and Great Seal of Missouri for any of the uses requested. There seems to be no reason for distinguishing between the use of the flag and Great Seal of Missouri by (1) private firms for commercial purposes, (2) fraternal, benevolent and other nonprofit organizations for noncommercial purposes, and (3) candidates for political offices, since, if there is no authority in the Secretary of State to issue such licenses, then it is immaterial as to who the requestee is.

The specific questions presented have not been resolved by the courts of this state, or, for that matter, the courts of any other state. However, the legislature has set out in numerous statutes the powers and duties of the Secretary of State with reference to the Great Seal of Missouri.

Article IV, Section 14 of the 1945 Constitution provides:

"Secretary of state--duties--state seal--official register--limitation on duties.--The secretary of state shall be custodian of the seal of the state, and authenticate therewith all official acts of the governor except the approval of laws. The seal shall be called the 'Great Seal of the State of Missouri,' and its present emblems and devices shall not be subject to change. He shall keep a register of the official acts of the governor, attest them when necessary, and when required shall lay copies thereof, and of all papers relative thereto, before either house of the general assembly. He shall be custodian of such records, and documents and perform such duties in relation thereto, and in relation to elections and corporations, as provided by law, but no duty shall be imposed on him by law which is not related to his duties as prescribed in this constitution."

The only statute concerning the Secretary of State with reference to the Flag of Missouri is Section 10.080, RSMo 1949, which reads as follows:

"Flag, official--design of--original design--where kept.--There is hereby adopted an official flag of the state of Missouri, which shall be rectangular in shape, the vertical width of which shall be to the horizontal length as seven is to twelve. It shall have one red, one white and one blue horizontal stripe of equal width; the red shall be at the top and the blue at the bottom. In the center of the flag there shall be a band of blue in the form of a circle enclosing the coat of arms in the colors as now established by law on a white ground. The width of the blue band shall be one-fourteenth of the vertical width of the flag and the diameter of the circle shall be one-third of the horizontal length of the flag. In the blue band there shall be, set at equal distances from each other, twenty-four five pointed stars. The original copy of the design shall be kept in the office of the secretary of state. The flag shall conform to the design herein set out on adjoining page."

Nowhere in the Constitution or the several statutes is there any express power given to the Secretary of State to issue a license of the type in question. Thus, it appears that any implied power to grant the license requested is negatived.

It further appears from the nature of his office that the Secretary of State's duties and powers are confined mainly to activities within the state. The statutes bear this out by limiting the duties and powers of the Secretary of State with respect to activities outside the state and confining them mainly to internal affairs. These conclusions are strengthened by the language in 59 Corpus Juris 116, Section 140:

"The secretary of state is an executive or ministerial officer, and possesses no judicial powers. He exercises his powers and duties throughout the territorial boundaries of the state, and for the purpose of discharging his functions is deemed constructively present in every part thereof. The secretary of state possesses no substantive powers except such as are enumerated in constitution or statute, cannot perform functions not falling within the authorized scope of his official duties, and can be required to act only in compliance with an existing law."

Honorable Walter H. Toberman -4-

If necessary, the questions might be resolved on the ground of public policy. In other words, there seems to be a second reason for denying the authority to the Secretary of State to issue the license in question. Certainly the people of Missouri would look with disfavor upon the use of the Flag and Great Seal of Missouri for other than official uses and identification purposes. They (Flag and Great Seal of Missouri) are traditionally thought of as being the inalienable property of the state, and to grant the use requested would result in a loss of dignity and efficacy to the Flag and Great Seal of Missouri.

CONCLUSION

It is therefore the opinion of this office that the Secretary of State of Missouri does not have the authority to grant permission for the use of the Flag or Great Seal of Missouri to any of the following:

- (1) Private firms for commercial purposes
- (2) Fraternal, benevolent and other nonprofit organizations for noncommercial purposes, and
- (3) Candidates for political office.

Yours very truly,

JOHN M. DALTON
Attorney General

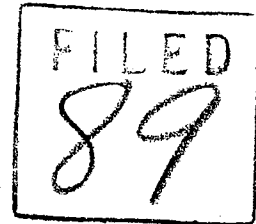
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OFFICERS:
DEPUTY CIRCUIT CLERKS AND
EX OFFICIO RECORDERS:
FOURTH CLASS COUNTIES:
APPOINTMENT:
QUALIFICATION:
COMPENSATION:

By proceeding in nature of quo warranto the Supreme Court of Missouri found Elvis Mouser had usurped the office of Circuit clerk and recorder of Bollinger County, Missouri since January 8, 1955, and ordered him ousted from office and emoluments as of that date; that Mrs. Medford J. Taylor was the legally appointed and qualified clerk as of said date. Mrs. Juanette Wagner is the legally appointed and qualified deputy of Mrs. Taylor and is entitled to receive monthly compensation fixed in the circuit court's order approving appointment on January 10, 1955 from said date as long as she is so employed.

February 28, 1956

Honorable Donald P. Thomasson
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri



Dear Mr. Thomasson:

This department is in receipt of your recent request for our legal opinion. Said request reads in part as follows:

"The question is whether the Deputy Clerk of the Circuit Court of Bollinger County appointed by and signing her oath of office at the time as Mrs. Merrill Taylor, or the Deputy Clerk appointed by Elvis Mouser is to receive the pay as Deputy during the period this office has been in dispute.

"Mrs. Juanette Wagner was appointed by Mrs. Merrill Taylor and signed her oath of office on January 10, 1955. Mrs. Carol Wilkerson was appointed by Elvis Mouser and worked from January 1, 1955 until December 12, 1955."

Said facts were further clarified in your letter of January 6, 1956, which reads in part as follows:

"There was a Circuit Court Order approving the appointment of Mrs. Carol Wilkerson as the deputy of Circuit Clerk Mouser. The Order was signed by Judge B. C. Tomlinson and Dated January 5, 1955, which order stated that Carol Wilkerson's term was to begin January 1, 1955 and end December 31, 1955. Carol Wilkerson was employed from January 1, 1955 until December 12, 1955, which was the date of the Supreme Court decision in the case of State ex inf. Dalton v. Mouser. The Circuit Court Order has never been

modified or rescinded and Mrs. Wilkerson was never discharged during the period of time she was employed. The Bollinger County Court has paid no salary whatsoever to Mrs. Wilkerson.

"On January 10, 1955, a Circuit Court Order approving the appointment of Juanette Wagner as Deputy Circuit Clerk of Mrs. Merrill Taylor was signed by Judge B. C. Tomlinson, which Court Order contained the same stipulations as the Order approving the appointment of Carol Wilkerson. Mrs. Wagner was never employed, such order has never been modified or rescinded and Mrs. Wagner was not paid any salary by the County Court."

In an original proceeding in the nature of quo warranto, in which the State of Missouri ex inf. John M. Dalton, Attorney General, was relator and Elvis Mouser was respondent, decided by the Supreme Court of Missouri on December 12, 1955, it was the judgment of the court that the respondent be ousted from the office of Circuit Clerk and Ex Officio recorder of Bollinger County, Missouri. The respondent is the same party referred to as Elvis Mouser in the opinion request.

The order of the court is summed up in the conclusion of the opinion in the above mentioned proceeding and reads as follows:

"In holding as we do, it should be understood that the acts of respondent as de facto clerk of the circuit court and ex officio recorder of Bollinger County since January 8, 1955, insofar as they concern the public or the rights of third persons, are to be considered as valid as though he had been a de jure officer. State ex rel. City of Clarence v. Drain, 335 Mo. 741, 73 S.W. 2d 804, 805-806.

"It is the judgment of this court that respondent has unlawfully usurped the office of Clerk of the Circuit Court and Ex Officio Recorder of Bollinger County since January 8, 1955; that he be ousted of said office and its emoluments as of said date; and that all costs herein be taxed against respondent."

Bollinger County is a county of the fourth class, and by virtue of Section 59.090 RSMo 1949, the clerk of the circuit court of said county is also ex officio recorder.

Sections 483.380 and 483.385 RSMo 1949 are in regard to the appointment and payment of compensation of deputy circuit clerks and recorders of fourth class counties. Section 483.380 reads as follows:

"The circuit clerk and recorder in counties of the fourth class shall be entitled to such number of deputies and assistants, to be appointed by such official, with the approval of the judge of the circuit court, as such judge shall deem necessary for the prompt and proper discharge of the duties of his office. The judge of the circuit court, in his order permitting the circuit clerk and recorder to appoint deputies or assistants, shall fix the compensation of such deputies or assistants which order shall designate the period of time such deputies or assistants may be employed. Every such order shall be entered on record, and a certified copy thereof shall be filed in the office of the county clerk. The circuit clerk and recorder may at any time, discharge any deputy or assistant, and may regulate the time of his or her employment and the circuit court, may at any time modify or rescind its order permitting an appointment to be made."

Section 483.385 reads as follows:

"All annual salaries provided in sections 483.370 to 483.380 shall be paid out of the county treasury in monthly installments at the end of each month by warrant drawn by the county court upon the county treasury."

The definition, and general rule prevailing with reference to the appointment, status and tenure of deputy officials is given in Volume 67 C.J.S., pages 449 and 450. The same information regarding the de facto deputies of public offices is also given at page 452 of said volume of C.J.S. and we quote said references:

"The term 'deputy,' when used with respect to a deputy of a public officer, is usually defined as one who by appointment exercises an office in another's right or name, that is, one who has no interest in the office, but whose acts done under color of office are of equal force with those of the officer himself."

"The authority given by law to a ministerial officer is given to the incumbent of the office, and a deputy is ordinarily regarded as the agent or servant of his principal. On the other hand, where provision is made by statute for the position of deputy, such deputy is regarded as a public officer, and it has been held that, if the superior is denominated an 'officer,' then the deputy is also an 'officer,' but, where a statute confers a power only to be exercised for, and in the name of, the principal, a deputy is not an officer, so that, where a state constitution provides for only one officer in a particular office, the legislature may not confer on a deputy a power to be exercised in his own right so as to constitute him an officer.

"Deputies, whether common-law or statutory, are, where their terms are not fixed by statute, supposed to be appointed at the pleasure of the appointing power, and their deputation expires with the office on which it depends. Deputies must, from this point of view, be distinguished from assistants to whom a fixed term has been given by law.

"The general rule that the acts of officers de facto are valid and effectual where they concern the public or the rights of their persons applies to de facto deputies. A de facto deputy performing the functions of an office existing in law, and claiming the right by some color of authority, may be held accountable for his conduct as if he were duly and legally qualified."

From the opinion in the above cited case, we note that Elvis Mouser was elected circuit clerk of Bollinger County at the general election held in 1950, and his term of four years began on the first Monday in January, 1951, and would end when his successor was elected and had qualified, as provided by Section 483.015 RSMo 1949, which reads as follows:

"At the general election in the year 1882, and every four years thereafter, except as herein provided, the clerks of all courts of record, except the clerks of the supreme court, the courts of appeals, the probate courts, the magistrate courts, and except as otherwise provided by law, shall be elected by the qualified voters of each county and of the city of St. Louis,

who shall be commissioned by the governor, and shall enter upon the discharge of their duties on the first Monday in January next ensuing their election, and shall hold their offices for the term of four years, and until their successors shall be duly elected and qualified, unless sooner removed from office."

Mouser served the term for which he had been elected and at the general election in 1954, he was a candidate to succeed himself for the next ensuing term of four years beginning on the first Monday in January, 1955. Merrill J. Taylor, the only rival candidate, received a majority of the votes cast at such election and was elected to said office.

On December 4, 1954, following the election, and before he had qualified for the office, Merrill J. Taylor died. On January 6, 1955, the governor appointed Mrs. Medford J. Taylor as the successor to Mouser. Mrs. Taylor qualified on January 8, 1955, and one of her first official acts was the appointment of Mrs. Juanette Wagner as deputy circuit clerk and recorder, which appointment was approved by the circuit judge on January 10, 1955, although the term of such appointment has not been stated in the opinion request or in the letter of clarification. No question has been raised concerning the legality of the appointment of Mrs. Wagner, and for the purposes of our discussion herein it will be assumed that the appointment was legally made and in accordance with the provisions of Section 483.380 supra.

It further appears that Mouser has been holding the office and performing the duties of same since his election in 1950 and up to the time the opinion in State ex inf. Dalton vs. Mouser, supra, was handed down on December 12, 1955, and that Mouser had appointed Mrs. Carol Wilkerson as his deputy and that Mrs. Wilkerson worked from January 1, 1955 to December 12, 1955. Apparently, the provisions of said Section 483.380, supra, were attempted to be complied with as the circuit judge, by order duly entered of record, approved the appointment of Mrs. Wilkerson on January 5, 1955. Neither Mrs. Wilkerson nor Mrs. Wagner have received any compensation as deputy circuit clerk and recorder to date, and with these facts in mind, we understand the opinion request to inquire which of the two deputies is entitled to the compensation so that the county court can pay the proper party.

It is believed that the answer to this question as to who the legally appointed deputy is and who would be entitled to the compensation would be dependent upon the answer to the question as to who was the legally elected or appointed circuit clerk at the time of the deputy's appointment, as there could only be one such legally

appointed or elected circuit clerk during the period in question, and that circuit clerk would be the only one who would be authorized to appoint deputies in accordance with said Section 483.380.

In the case of State ex inf. Dalton vs. Mouser, the court held that Mouser had usurped the office of circuit clerk and recorder of Bollinger County since January 8, 1955, and that he be ousted as of that date from the office and its emoluments, and the court further stated in its opinion, that Mouser was a de facto clerk of the circuit court and ex officio recorder of said county since January 8, 1955, and that his acts, as such, insofar as they concern the public, or the rights of third persons are considered as valid as though he had been a de jure officer. The court further held that Mrs. Taylor was the legally appointed successor to Mouser. As such legally appointed clerk, Mrs. Taylor and no one else could appoint deputies under the provisions of said Section 483.380. Not being the legally elected or appointed clerk at the time, Mouser had no authority to appoint Mrs. Wilkerson as deputy clerk, and his action in that regard was a nullity. As an appointee of a de facto officer, Mrs. Wilkerson was a de facto deputy, and her performance of the duties of the office, insofar as the public and the rights of third persons are concerned, since January 8, 1955, are as valid as if she were a de jure deputy. However, she had no right to compensation as a de facto deputy against Mrs. Wagner, the de jure deputy.

It is unfortunate that Mrs. Wilkerson, who has performed the duties of deputy circuit clerk until December 12, 1955, is not legally entitled to compensation as such, but since her appointment was made by one who was not the circuit clerk, but only usurped the office, her appointment was illegal and she is not entitled to receive any compensation under the provisions of Section 483.385. It appears that any recourse that she might have to recover compensation for services rendered would be against Mouser personally and not against Bollinger County.

In view of the foregoing, it is our thought that Mrs. Wagner, the legally appointed deputy circuit clerk and recorder is entitled to compensation as such in accordance with the amount fixed in the circuit judge's order approving her appointment on January 10, 1955, and that Mrs. Wagner should be paid monthly compensation as long as she is employed as deputy circuit clerk and recorder. The county court should issue the proper warrants on the county treasury to cover said compensation.

CONCLUSION

It is the opinion of this department that when, in the original proceeding in the nature of quo warranto, the Supreme Court of Missouri found that Elvis Mouser had unlawfully usurped the office of circuit clerk and ex officio recorder of Bollinger County since January 8, 1955, and ordered him ousted from said office and its emoluments as

of that date, and further found Mrs. Merrill J. Taylor to be the legally appointed and qualified circuit clerk as of said January 8, 1955; that Mrs. Wagner, appointee of Mrs. Taylor, is the legally appointed and qualified deputy circuit clerk and ex officio recorder of said county. As such deputy, Mrs. Wagner is entitled to receive the monthly compensation, fixed by the circuit court in its order approving her appointment on January 10, 1955, from said date, as long as she is so employed.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Yours very truly,

JOHN M. DALTON
Attorney General

PNC/bi

APPROPRIATIONS:
PUBLIC PRINTING:

Expenses incident to the publication of Constitutional Amendment No. 1, voted upon January 24, 1956, and not covered by the provisions of Section 12 of House Bill 5 (Special Session), may be paid from funds available for printing under the provisions of Section 4.130 of House Bill 4, adopted by the 68th General Assembly.



June 26, 1956

Honorable Walter H. Toberman
Secretary of State
Capitol Building
Jefferson City, Missouri

Attention: Will Davis, Chief Clerk

Dear Mr. Toberman:

Reference is made to your request for an official opinion of this office, which request reads in part as follows:

"This office respectfully requests an opinion based on the following facts:

"Section 12 of House Bill 5, recently passed in the special session of the 68th General Assembly and subsequently signed by the Governor, appropriated \$24,624.00, '..... for the use of the Secretary of State, for the payment of expenses incident to the publishing of constitutional amendment No. 1 at the Special Election held January 24, 1956, as provided by law, for the period ending June 30, 1957.' (Copy of House Bill 5 is enclosed.) A final tally of affidavits filed by newspapers publishing the text of amendment No. 1 shows the affidavits total \$24,732.00 - or \$108.00 more than Section 12 provides. This amount is exactly the total owed for one additional newspaper publishing two insertions of the amendment as provided by Section 125.010, Revised Statutes of Missouri, 1949. Thus, it is apparent one newspaper was not included for payment in the amount made available by Section 12 of House Bill 5.

* * * * *

Honorable Walter H. Toberman

"Our question is this: since this office has sufficient money in our regular operation fund to pay the \$108.00 not covered by Section 12, House Bill 5; and in view of the fact we are allowed to pay other printing costs, including those of this Special Election, out of this regular operation fund, may we do so with the approval of the Director of Printing in the State Purchasing Agent's Office?"

Section 4.130 of House Bill 4, enacted by the 68th General Assembly, provides in part as follows:

"Operation:

"General expenses: consisting of communication, printing, binding, transportation of things, travel within and without the state, material and supplies, insurance and premiums on bonds and other miscellaneous expenses, \$80,000.00."

You inquire whether expenses incident to the publication of Constitutional Amendment No. 1, which amendment was voted upon January 24, 1956, may be paid from funds available for "printing" under the provisions of Section 4.130 of House Bill 4, supra.

While the 68th General Assembly, in Special Session, did, as you state, make an appropriation for the payment of expenses incident to the publication of Constitutional Amendment No. 1, we do not believe that such appropriation is exclusive, but was merely a recognition that the funds then available to the office of Secretary of State would be insufficient to meet said expenses.

The provisions of Section 4.130 of House Bill 4, relating to printing, are sufficiently broad to include the printing here referred to, and it is our opinion that any deficiency not covered by Section 12 of House Bill 5 (Special Session) can be paid from said funds.

CONCLUSION

Therefore, it is the opinion of this office that expenses incident to the publication of Constitutional Amendment No. 1, voted upon January, 1956, and not covered by the provisions of House Bill 5 (Special Session), may be paid from funds available

Honorable Walter H. Toberman

for printing under the provisions of Section 4.130 of House Bill 4, adopted by the 68th General Assembly.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

Very truly yours,

John M. Dalton
Attorney General

DDG/ld

SCHOOLS: When school site is abandoned and land reverts to original grantor, school district in removal of buildings not obligated to remove foundation stones, to fill basements, pump pits, etc.
SCHOOL DISTRICTS: Board in six-director district without authority to lease lands or buildings for private purposes for gain.

October 19, 1956



Honorable Donald P. Thomasson
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri

Dear Mr. Thomasson:

This is in response to your request for an opinion dated July 13, 1956, which reads as follows:

"Recently I have received a request from the Superintendent of Schools of Zalma, Missouri, for an answer to the following question:

Where an individual has conveyed certain land to a School District containing the following reversionary clause:

Provided however, that in the event said land should discontinue being used as a school house site and for school purposes, that then and in that event, the said land shall revert to and re-invest in the first parties, their heirs and legal representatives, it being the intention to convey same for the purposes of a school house site and for school purposes;

and once the land has reverted back to the original owner due to its non-use as a school, and after the school district has removed the school building proper, then what obligation does the School District have regarding the clearing or cleaning up of the grounds after the school building has been removed. That is, do all foundation stones or concrete have to be removed and holes have to be filled, such as basements, pump pits, toilet pits, etc.?

Honorable Donald P. Thomasson

"In addition, can the Board of Education legally lease these buildings to private individuals on a temporary basis for private purposes?"

The case of Board v. Nevada School Dist., 363 Mo. 328, 251 SW2d 20, decided that a deed such as this one creates a determinable fee in the school district; that when the district ceases to use the district for a schoolhouse site or for school purposes, the land in its unimproved state reverts to its original grantor or his heirs and that the district may remove the buildings which it has placed thereon. In the course of the opinion the court made the following comment, SW2d 1.c. 26:

"As stated, as long as the present estate in fee simple determinable continues, the respondent School District has all of the incidents of a fee simple title to the described premises. Respondent may remove the improvements thereon and construct other improvements at will. In this connection the general rule seems to be that the owner of an estate in fee simple determinable is not chargeable for waste within the general acceptance and meaning of the term, but that under some circumstances a court of equity may restrain him from committing equitable waste. Williams v. McKenzie, supra, 262 S.W. 598; Gannon v. Peterson, 193 Ill. 372, 62 N.E. 210, 213, 55 L.R.A. 701; 31 C.J.S., Estates, §10, page 24; 67 C.J. 622, Waste, Sec. 20; 56 Am. Jur. 457, Waste, Sec. 11; 19 Am. Jur. 491, Estates, Sec. 30; 27 R.C.L. 1037, Sec. 28; Ann. Cases, Vol. 35, 1915A, 229. Contra: A.L.I. Restatement of Property, Vol. 1, Sec. 49, p. 170, but see comment in 19 Am. Jur. 491 footnote 3.

* * * * *

" * * * In view of the evidence we draw the inference that the improvements were made by School District No. 119 at its own expense and with public funds, at least, appellants offered no evidence tending to show that there were any improvements on the property when it was conveyed to School District No. 119, or that any of the improvements were made by the grantors or their heirs. We further imply from the terms of the grant that the construction of a school building and improvements at the expense of the School

Honorable Donald P. Thomasson

District was contemplated by the parties when the deed was executed and delivered. It was further contemplated by the parties that there was a possibility the property might not always be used for the purpose for which it was being conveyed. Accordingly, the deed further provided, 'whenever it is abandoned by the directors and ceases to be used for that purpose the title shall immediately revert to the grantors herein.' In such situation we hold that the improvements placed upon the property remained the personal property of School District No. 119 and that said district or its successor in interest would continue to own the school building and improvements, and only the land in its unimproved condition would revert to the grantors or their heirs in the event that the estate granted expired by reason of the limitations stated in the Board deed. In this connection it should be said that appellants who brought the ejectment suit and sought to recover possession of both the real estate and the improvements, offered no evidence tending to show that the improvements could not be removed from the premises without injury to the freehold estate."

In view of the first part of your opinion request, the question then becomes whether the school district would be chargeable with equitable waste if it removed the buildings from the premises and did not remove foundation stones, fill all holes such as basements, pump pits, etc.

The definitions of equitable waste are rather nebulous and extremely difficult to apply to given factual situations. For example, the case of Gannon v. Peterson, 193 Ill. 372, 62 NE 210, cited in the Board case, supra, which involved a situation where the executory devisees, the holders of the reversionary interest, sought to enjoin the owner of the determinable fee from mining coal as constituting equitable waste, contains the following discussion of equitable waste at NE 1.c. 213:

"The authorities are uniform as to the definition, duration, and extent of a base or determinable fee. They are agreed that it is a fee-simple estate; not absolute, but qualified. Upon the death of the donee his widow has dower, although the contingency may have happened that defeats the estate, and that within the general

acceptation and meaning of the term the person seised of such an estate is not chargeable with waste. But there has been ingrafted into equity a form of waste not recognized at common law, which is termed 'equitable waste,' and of which courts of chancery take cognizance, and under the theory of which they grant relief to the holders of contingent and executory estates. Equitable waste is defined by Mr. Justice Story to consist of 'such acts as at law would not be esteemed to be waste under the circumstances of the case, but which, in the view of a court of equity, are so esteemed from their manifest injury to the inheritance, although they are not inconsistent with the legal rights of the party committing them.' 2 Story, Eq. Jur. § 915. And the learned jurist gives as instances of this class of interference where the mortgagor fells timber on the mortgaged premises to the extent that the security becomes insufficient; where a tenant for life, without impeachment for waste, pulls down houses, or does other waste, wantonly and maliciously; and he adds: 'For it is said a court of equity ought to moderate the exercise of such a power, and, pro bono publico, restrain extravagant, humorous waste.' And he concludes: 'In all such cases the party is deemed guilty of a wanton and unconscientious abuse of his rights, ruinous to the interests of other parties.' The definition given above is accepted by most of the text writers, and quoted with approval by the courts, and it is this principle the appellees (complainants below) invoke, and insist that under it the decree of the circuit court should be affirmed. It will be observed that no certain criteria are set forth in the definition by which courts may determine when the rule of equitable waste applies, but it is said that extravagant and humorous waste will be enjoined pro bono publico, and in that class of cases where the writ is allowed the party will be deemed guilty of a wanton and unconscientious abuse of his rights. In *Turner v. Wright*, 6 Jur. (N.S.) 809, 29 Law J. Ch. 598, Lord Chancellor Campbell defines equitable waste to be 'that which a prudent man would

not do with his own property.' This latter statement of the rule is the most comprehensive we have been able to find, and seems to us to be a safe guide in our consideration of the case before us."

The Gannon case was cited in Williams v. McKenzie, 203 Ky. 376, 262 SW 598, which was also cited by the Missouri court in the Board case. The Williams case held that the leasing of premises deeded for school purposes and containing a reversionary clause for the purpose of removing gas and oil would not constitute equitable waste and since the district continued to maintain schools on the premises would not constitute such a use of the land as would work an abandonment causing title to revert to the grantor.

See, however, Skipper v. Davis, Texas Civil Appeals, 59 SW2d 454, where, under similar circumstances, the Texas court held that the removal of gas and oil would constitute equitable waste on the part of the holder of the determinable fee.

Other definitions of equitable waste cited in the Board case are as follows:

67 C.J., Waste, Section 20, page 622:

"A tenant of a base or qualified fee cannot be held liable for waste, except for equitable waste or waste committed in violation of an express stipulation, and, in the case of equitable waste, only where the contingency which is to determine the estate is reasonably certain to happen, and the waste is of a character to charge the owner with a wanton and unconscientious abuse of his rights; but where the happening of the contingency is remote, so that the reversioner has only an expectancy, a mere possibility of reverter, equity will not enjoin the owner of the base or determinable fee. So a person holding a vested estate for life, coupled with a contingent interest in the fee, is not liable in an action for waste, although he may be enjoined in a proper case from further despoiling and injuring the inheritance. A tenant in tail is not punishable for waste, but a tenant in tail after possibility of issue extinct may be enjoined from committing waste."

19 Am. Jur. 491, Estates, Section 30, page 491:

"It has been held that the owner of a determinable fee is not chargeable with waste, although equity will sometimes restrain him from committing equitable waste."

19 Am. Jur. 491, Estates, Section 30, page 491, footnote 3:

"See Am. Law Inst. Restatement, Property, Vol. 1, § 49, in which it is said that the broad privilege of ownership of a holder of a determinable fee is limited by a duty not to commit waste. The examples cited, however, show that only in extreme cases will action by the holder of such an estate be considered waste within the rule that it may be enjoined by the owner of the possibility of reverter, whose future interest is so tenuous that any substantial restriction on the owner of the determinable fee would be unreasonable."

In addition, see the following:

Tiffany Real Property, Third Edition, Vol. 2, Section 645, page 659:

"The doctrine of 'equitable waste,' by which waste of a character which is not recognized at law as illegal, is relieved against in equity by an injunction to prevent it, and, when possible, by compelling the restoration of the thing wasted, has been very fully developed in England. In this country there are but few decisions in which waste has been considered as of such a character as to be cognizable in equity, and not at law, and the extent to which there is such a thing as equitable waste, as distinct from legal waste, appears doubtful."

Equity, de Funiak, Section 23, page 55, footnote 8:

"'8. Chancery goes greater lengths than the courts of law in staying waste. It is a wholesome jurisdiction, to be liberally exercised in the prevention of irreparable injury, and depends on much latitude of discretion in the court.' Kane v. Vanderburgh, (1814) 1 Johns. Ch. (N.Y.) 11."

From the cases, this latter statement is obviously true, i.e., that the application of the doctrine of equitable waste depends on much latitude of discretion in the court. It would seem also that the injury complained of must be such as is recognized by equity as irreparable. Other definitions above incorporate the principle that the damage done must be malicious, wanton or extravagant, that the use to which the land is being put is not such as an ordinary prudent man would make of his own property.

The Missouri court, in the Board case, recognized that in a deed of this type the parties contemplated that buildings and other improvements would be constructed on the land, that there was a possibility that the land might not always be used for school purposes and by contemplation of law that upon abandonment the school district would be privileged to remove the buildings and other improvements that it had placed upon the land. Under those circumstances we believe it was further contemplated that upon removal of the buildings and other improvements there would be some injury to the freehold estate and in the absence of an express agreement to do so the land would not be returned in its original unsullied state.

Therefore, we are of the opinion that although in the removal of the buildings and other improvements the school district may not extravagantly, maliciously and imprudently injure the freehold estate, it is not obligated to remove foundation stones, fill basements, pump pits, etc., which were reasonable and necessary incidents of the construction and removal of the buildings and other improvements on the land placed there in order to make it useable for the purpose for which it was conveyed, i.e., school purposes.

By your second question, we take it that the board of education may not be certain whether it intends to abandon this land as a school site and desires to know whether it may lease the land temporarily until it is able to make this determination. Under those circumstances, the question might arise as to whether the use of the land for other than school purposes would cause a reverter to the original grantor or his heirs, but in view of the broader question, i.e., the authority of the board to make such a lease and our conclusion thereon, we do not deem it necessary to rule on that question.

It has been said by the appellate courts of this state on many occasions that a school district is merely a creature of the Legislature, having only such powers as have been expressly conferred upon it or such as arise therefrom by necessary implication. State v. Kessler, 136 Mo. App. 236, 240, 117 SW 85; Consol. School

Honorable Donald P. Thomasson

Dist. No. 6 of Jackson County v. Shawhan, Mo. App., 273 SW 182, 184; Wright v. Board of Education of St. Louis, 295 Mo. 466, 476, 246 SW 43; 56 C.J., Schools and School Districts, p. 193, Section 46, p. 294, Section 152. Although under Section 166.010, RSMo 1949, the title to schoolhouse sites is vested in the district, the Supreme Court has held that the district is merely the statutory trustee thereof for the state. School Dist. of Oakland v. School Dist. of Joplin, 340 Mo. 779, 102 SW2d 909.

By statute, the board of education is vested with the government and control of the school district. Section 165.317, RSMo 1949. Yet, Section 166.030, RSMo 1949, specifies what additional use may be made of school property other than the conduct of schools and does not include leasing for private purposes for gain. Section 165.370, RSMo 1949, provides specifically that if in a six-director district there is property no longer required for the use of the district, the board may advertise, sell and convey the same, the proceeds thereof to be placed to the credit of the building fund. The question then is whether, having this narrow and limited grant of authority, the board may dispose of its property in any other manner.

There are no Missouri cases directly in point. However, the West Virginia court, in Herald v. Board of Education, 65 SE 102, faced a similar problem and under similar statutory authority and judicial declaration of the limited powers of school districts generally concluded that the district could not lease its lands for private purposes and for gain.

Quotations from that case will demonstrate the similarity between the reasoning of the court therein and that exemplified by the Missouri courts in construing the powers of school districts generally. For example, at SE 1.c. 104 the court said:

" * * * 'The board of education of a school district is a corporation created by statute with functions of a public nature expressly given and no other; and it can exercise no power not expressly conferred or fairly arising from necessary implication, and in no other mode than that prescribed or authorized by the statute.' * * *

* * * * *

" * * * But counsel say that among those powers under the statute is one which would justify this lease in the language: 'Said board shall

receive, hold and dispose of according to the rules of law and intent of the instrument conferring title, any gift, grant, devise or bequest made for the use of any free school.' That clause uses the words 'according to * * * the rules of law and the intent of the instrument conferring title.' * * *. In connection with the words relied on by counsel for such power in the board, we must not forget section 33, c. 45, Code 1906 (section 1621). It provides that the president of the board shall examine the schoolhouses and sites, and report their condition to the board. Such as are in their judgment properly located and sufficient, or can be rendered so, shall be retained and the remainder, with the consent of the county superintendent, be sold by the board, but the statute provides carefully that the proceeds shall be added to the building fund. There is a limitation upon the power of disposition. The sale must be for money, and the money go into the building fund. That does not contemplate a lease for oil. * * * Did the Legislature ever intend to vest any such power in a school board? If such boards may wield such powers, where is the limit, and how far may it not frustrate the whole purpose of the ownership of the board? We are told that the board has the legal title in fee simple. So it has, but it is not a private owner, because it holds such title in trust for these plaintiffs and their children, and for those that may come after them. * * *"

The court held the lease void.

A similar result was reached in *Presley v. Vernon Parish School Board* (La.), 139 So. 692. In that case the court quoted from R.C.L., Volume 24, Schools, page 585, Section 34, as follows:

" * * * Unimproved school lands are subject to the same restrictions as schoolhouses, and the school board cannot permit them to be used for collateral purposes, even though profitable. This is on the ground that school boards have power only over educational matters, and so have no power to lease or grant school property for other purposes. School officers will not be

Honorable Donald P. Thomasson

permitted to use school money to erect a building to be leased for collateral purposes, no matter how remunerative the undertaking promises to be. Nor will they be permitted to include in the plans for a schoolhouse features of no educational advantage and intended primarily to facilitate the leasing of the property during nonschool hours for collateral purposes. Illegal collateral uses may be enjoined at the suit of residents or taxpayers of the district."

A contrary result was reached in *Atlas Life Ins. Co. v. Board of Education (Okla.)*, 200 P. 171, and the *Gannon* case, *supra*, but on totally different statutory and constitutional authorization.

We conclude therefore that because of the Missouri judicial decisions confining the powers of school boards to that expressly granted them by legislative enactment or those arising therefrom by necessary implication, and the reasoning of the *West Virginia* case, *supra*, a school board in a six-director school district does not have the authority to lease its buildings or lands for private purposes. If they are no longer needed for school purposes, it may only "advertise, sell or convey" same in conformity with the statutes.

CONCLUSION

It is the opinion of this office that when a school removes buildings and other improvements from land which, under a reversionary clause, has reverted to the original grantor or his heirs, it is not obligated to remove therefrom foundation stones or fill holes such as basements, pump pits, etc., which were reasonably incident to the use of the land for school purposes.

It is the further opinion of this office that the board of education of a six-director school district does not have the authority to lease its buildings or lands to private persons for private purposes for gain.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:bi;ml

MERCHANT'S TAX: Owners of plant nurseries who maintain sales facilities
TAXATION: on the nursery premises and who do not have a regular
NURSERIES: stand or place of business away from such premises are
not merchants subject to the merchant's tax as provided
in Section 150.040, RSMo 1949.



April 18, 1956

Honorable Jimmie B. Trammell
Prosecuting Attorney
Stoddard County
Bloomfield, Missouri

Dear Mr. Trammell:

Reference is made to your request for an official opinion of this office, which request reads as follows:

"The County Court of Stoddard County, Missouri, has asked me to contact your office regarding a question which has arisen in this County under our tax laws.

"We have two Plant Nurseries within this county. Both of these Nurseries have land upon which they grow their stock. They maintain offices in buildings upon this land and employ salesmen who sell this nursery stock. The question has arisen whether the owners of these nurseries are 'Merchants' under the provisions of Section 150.040."

Section 150.040, RSMo 1949, provides that "merchants" shall pay an ad valorem tax equal to that which is levied upon real estate on the highest amount of all goods, wares and merchandise which they may have in their possession or under their control whether owned by them or consigned to them for sale at any time between the first Monday in January and the first Monday in April of each year.

Section 150.010, RSMo 1949, defines a merchant as follows:

"Every person, corporation, copartnership or association of persons, who shall deal in the selling of goods, wares and merchandise at any store, stand or place occupied for that purpose, is declared to be a merchant.

Honorable Jimmie B. Trammell

Every person, corporation, copartnership or association of persons doing business in this state who shall, as a practice in the conduct of such business, make or cause to be made any wholesale or retail sales of goods, wares and merchandise to any person, corporation, copartnership or association of persons, shall be deemed to be a merchant whether said sales be accommodation sales, whether they be made from a stock of goods on hand or by ordering goods from another source, and whether the subject of said sales be similar or different types of goods than theytype, if any, regularly manufactured, processed or sold by said seller."

Said term is further defined in Section 150.020, RSMo 1949, as follows:

"The term 'merchant' as used in sections 150.010 to 150.290, shall be construed to include all merchants, commission merchants, grocers, manufacturer and dealers in drugs and medicines, except physicians for medicines used in their practice, whether trading as wholesale or retail dealers."

Section 150.030, RSMo 1949, provides that a farmer who sells any article of farm produce or farm products which are grown or processed on his farm shall not be considered a merchant, provided he does not have a regular stand or place of business away from his farm. Said section more fully provides:

"Any farmer residing in this state who shall grow or process any article of farm produce or farm products on his farm, is hereby authorized and permitted to vend, retail or wholesale said products, free from license, fee or taxation from any county or municipality, in any quantity he may choose, and by doing so shall not be considered a merchant; provided, he does not have a regular stand or place of business away from his farm; and provided further, that any such produce or products shall not be exempted from such health or police regulations as any community may require."

Honorable Jimmie B. Trammell

We are of the opinion that under facts stated the owner of a plant nursery, even if considered a merchant under the provisions of Sections 150.010 and 150.020, supra, would be exempted from taxation as such, under the provisions of Section 150.030, supra. Said latter section exempts from the provisions of Sections 150.010 and 150.020, supra, a person engaged in the operation of farming. Farming means the act of devoting land to the processes of agriculture and agriculture includes horticulture and floriculture.

In the case of DeWeaver vs. Jackson & Perkins Co. 63 N.Y.S.(2d) 593, the Appellate Division of the Supreme Court of New York at l.c. 596, said:

"* * *Broadly stated, farming, or the verb to farm, includes and means the act of devoting land to the processes of agriculture and in its broad sense the noun agriculture includes horticulture, floriculture, etc. * * *"

In the case of Hill vs. Georgia Casualty Co., 45 S.W.(2d.) 566, 567, the Commission of Appeals of Texas said:

"* * *The specific branch of agriculture to which the nursery industry belongs is denominated 'horticulture,' * * *Horticulture is a branch of plant production, which is one of the main divisions of agriculture."

See also In re Slades Estate, 55 Pac. 158, l.c. 159, wherein the Supreme Court of California said:

"* * *the followers of this ancient and honorable occupation may call themselves 'horticulturists' or viticulturists' or 'gardners' but they are farmers and their occupation is that of farming, * * *."

We believe that it is clear from the foregoing noted authorities that a person who engages in the occupation of horticulture or floriculture is actually engaged in farming and would be exempt from the payment of a merchant's tax under the provisions of Section 150.040, RSMo 1949, so long as such person does not have a regular stand or place of business away from his farm.

Honorable Jimmie B. Trammell

CONCLUSION

Therefore, it is the opinion of this office that owners of plant nurseries who maintain sales facilities on the nursery premises and who do not have a regular stand or place of business away from such premises are not merchants subject to the merchant's tax as provided in Section 150.040, RSMo 1949.

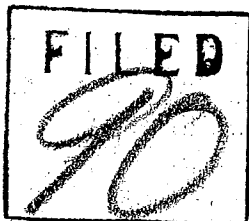
The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Donal D. Guffey.

Yours very truly,

John M. Dalton
Attorney General

DDG:mw

SCHOOL ELECTION:
BALLOT:
NOTICE OF ELECTION:



(1) All propositions to be voted on may appear on one ballot under Section 165.330, Cum. Supp. 1955. (2) Only the levy which was not properly advertised need be resubmitted for a vote. Neither the levy for the building fund nor the election of board members need be resubmitted to a vote. (3) The election of board members would not be void where only one blank space was provided for two write-in candidates. (4) That part of the election, which is in compliance with the requirements of the law, is valid irrespective of the fact that other parts of the election are invalid.

May 22, 1956

Honorable Ernest "Jack" Troutman
Prosecuting Attorney
Carroll County
Carrollton, Missouri

Dear Sir:

This will acknowledge receipt of your opinion request of April 30, 1956, and your statement of facts of May 3, 1956, in which you ask the following:

"An opinion is respectfully requested concerning the following situation:

"The Reorganized School District R-V at Bosworth, Carroll County, Missouri, held their annual school election during April, 1956. The election had been advertised as calling for an election of two board members and an election on a levy of an additional 25¢ for the incidental fund. The actual ballot has been described as containing only one blank line to be used to vote for a write-in candidate. Others swear that the ballot contained two blank lines for the write-ins. Also appearing on the same ballot was a place for the voters to vote for a levy of 25¢ for the teachers fund and a levy of 10¢ for the incidental fund. Following the election the discrepancy between the advertised levy and the levy appearing on the actual ballot was pointed out to the school authorities and a new election has been called for May 10, 1956, for the purpose only of revoting on the tax levy.

"The questions to which we request answers are these:

Honorable Ernest "Jack" Troutman

1. Should the election for board members have appeared on a separate ballot from the election on the tax levy? If so, is the election thereby void?

2. Under the above described circumstances may the tax levy alone be resubmitted to the voters or must the entire election, including that for board members, be resubmitted?

3. Assuming only one blank space existed for the two write-in candidates for board members, would that render that portion of the election void?

4. Assuming two blank spaces were available for the purpose of write-ins for directors, does the fact that part of the ballot was in error, render the entire election void and make an entire new election necessary?

"It is respectfully requested that this opinion be expedited insofar as you can."

"I regret to inform you that the facts previously given me, and appearing in the above captioned letter, are somewhat in error.

"The errors occur in the information given you concerning the proposed tax levy. The true facts concerning the proposed levy are this:

"The advertised levy was '25¢ for incidental fund and 10¢ for building fund.' The ballot afforded the voters an opportunity to vote on '25¢ for teachers fund and 10¢ for building fund.'

"The re-election has been called to vote on the 25¢ levy only.

"The other facts contained in my letter of April 30th are the same. And the questions asked are the same."

Honorable Ernest "Jack" Troutman

The answer to your first question is that all propositions submitted may be voted for on the same ballot. See subsection 2 of Section 165.330, Cum. Supp. 1955, which reads in part as follows:

"2. All propositions submitted at said annual meeting may be voted for upon one and the same ballot, and necessary poll books shall be made out and furnished by the secretary of the board; * * *"

In the third and fourth questions, the issue is raised concerning blank spaces for write-in candidates. See the case of *Armantrout vs. Bohon*, 162 S.W. 2d 867, where it was stated that elections are not lightly set aside. The Supreme Court of Missouri, at l.c. 871 said:

"(8-10) As the appellant suggests, 'elections should be so held as to afford a free and fair expression of the popular will.' *State ex inf. McKittrick v. Stoner*, 347 Mo. 242, 146 S.W. 2d 891, 894. But 'elections are not lightly set aside' and there is a vast difference in passing on the rules and regulations regarding the conduct of an election before the election is held and after. 29 C.J.S., Elections, Sec. 249, p. 360; 18 Am. Jur., Sec. 206, p. 319. As a general rule an election will not be annulled even if certain provisions of the law regarding elections have not been strictly followed in the absence of fraud. *State ex rel. Miles v. Ellison*, supra. As to whether the election was conducted in accordance with the law the matter is aptly covered in *Breuninger v. Hill*, 277 Mo. 239, Loc. Cit. 247, 210 S.W. 67, loc. cit. 69: 'A first essential, therefore, in the determination of the matter at issue, is whether any of the mandatory provisions of the Constitution or statutes regulating the rights of voters and the calling and conduct of the election, have been violated.'

"(11,12) As we understand it, the appellant does not contend that any mandatory law, constitutional or statutory, was violated and we

Honorable Ernest "Jack" Troutman

are unable to find any such violation from her allegations. The quoted statute (Sec. 10483, R.S.No. 1939, Mo. R.S.A. Section 10483) says the voting shall be 'at such convenient place or places * * * as the board may designate.' It may 'at the option of the board' be held at the same time and place as city elections are held in certain counties. But none of these provisions may be construed as mandatory. It does not appear that any city elections were being conducted at the time. There are times conceivably, when one voting place in Hannibal would be adequate for the submission of school matters to the voters of the district, although we doubt that to be the case when there is a contest over the office of county superintendent. But even so, we cannot say that the board's designation of only one voting place in that district was a violation of any mandatory provision of the law, even though it did not provide places easily accessible and convenient to the voters. The board may not have used the best judgment in selecting voting places but that only one place was designated, in this instance and under the circumstances, is not such an abuse of their discretion, or disregard of the election laws that the election may be invalidated for this reason. * * *

From the above quotation, it can be seen that elections will not be set aside for failure to provide blank spaces on the ballot for write-in candidates, unless there is a mandatory requirement of such. There are no mandatory requirements for such in the statutes and therefore, the election is not invalidated for failure to provide the write-in lines on the ballot.

The second question is directed toward that part of the election which was not properly advertised. As to the additional levy of tax rate increase, there is a discrepancy between the notice thereof and the proposition as it appeared on the ballot. The validity of said tax rate increase is to be determined by looking at the applicable constitutional and statutory provisions.

An increase in tax rates in school districts is provided for in Article X, Section 11 (c) of the Constitution of Missouri as amended in 1950, when submitted to a vote. Section 165.080, Cum. Supp. 1955, provides for the method of increasing the rate

Honorable Ernest "Jack" Troutman

of taxation which is authorized by the Constitution, and among other things, requires due notice to be given as required by Section 165.200.

Section 165.200, RSMo 1949, reads as follows:

"The annual meeting of each school district shall be held on the first Tuesday in April of each year, at the district schoolhouse commencing at two o'clock p.m. If no schoolhouse is located within the district, the place of meeting shall be designated by notices, posted in five public places within the district fifteen days previous to such annual meeting, or by notice for same length of time in all the newspapers published in the district, giving the time, place and purposes of such meeting."

The latter two sections, in respect to an increase in the rate of taxation, have been construed as being mandatory in that the notice must substantially comply with said sections. In the case of *Young vs. Brasfield*, 228 S.W. 283, no newspaper publication was had, and but four notices were posted of a special election held in a school district on the question of increasing the tax levy. The levy thereunder was void.

See also the case of *State ex rel. School District of Affton vs. Smith*, 80 S.W. 2d 858, 336 Mo. 703, where the proposition voted on was consolidation of school districts. The court held that where the statutes require notice, any action taken by the voters without notice or with an insufficient notice is void.

Under the authority of the above cases, notice of an increase in the rate of taxation was required. No notice having been given as required for the increase in the teachers' fund which, in fact, was voted, said levy is invalid. This must be resubmitted.

The increase for the building fund was advertised and properly submitted to a vote. It need not be resubmitted.

CONCLUSION

It is, therefore, the opinion of this office that:

(1) All propositions to be voted on may appear on one ballot under Section 165.330, Cum. Supp. 1955.

(2) Only the levy which was not properly advertised need be resubmitted for a vote. Neither the levy for the building

Honorable Ernest "Jack" Troutman

fund nor the election of board members need be resubmitted to a vote.

(3) The election of board members would not be void where only one blank space was provided for two write-in candidates.

(4) That part of the election, which is in compliance with the requirements of the law, is valid irrespective of the fact that other parts of the election are invalid.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Harold L. Henry.

Yours very truly,

JOHN M. DALTON
Attorney General

HELDAL:hw

COUNTY BOARD OF
EQUALIZATION:
STATE TAX COMMISSION:
TAXATION:

In the event a county board of equalization raises the assessed valuation of properties within the county, notice of such action should be given to the person owning or controlling the property affected, in person or by mail, if the address is known, and valid notice by publication can only be effected where the address of such person or persons is unknown. Further, in performing their duties in regard to intracounty equalization, the county board of equalization must maintain the aggregate assessed valuation as previously fixed and determined by the state tax commission.

July 12, 1956

Honorable Ernest "Jack" Troutman
Prosecuting Attorney
Carroll County
Carrollton, Missouri



Dear Mr. Troutman:

Reference is made to your request for an official opinion of this office. You state that the State Tax Commission has ordered a thirty-five per cent increase in the aggregate assessed valuation of town lots in Carroll County, and inquire as follows:

"1. Can the Carroll County Board of Equalization place advertisements in newspapers throughout the County to acquaint the owners of town lots of the 35% raise in assessments, and comply with the law thereby?

"2. If this cannot be done, must each owner of a town lot be contacted by mail individually? (and I am informed it is impossible for 100% notification by this method.)

"3. Can the Carroll County Board of Equalization legally and lawfully refuse to comply with the directive to raise the assessments?

"4. In the event the said Board of Equalization does refuse to comply with the directive, can they be forced to do so by the State Tax Commission and by what method could they be forced?"

You first inquire whether notice of increased assessments may be effectuated by placing advertisements in newspapers throughout the county.

Your attention is invited to Section 138.050 RSMo 1949, which section provides in part as follows:

Honorable Ernest "Jack" Troutman

"They shall raise the valuation of all tracts or parcels of land and all tangible personal property as in their opinion have been returned below their real value; but, after the board has raised the valuation of such property, it shall give notice of the fact, specifying the property and the amount raised, to the persons owning or controlling the same, by personal notice, or through the mail if address is known, or if address is unknown, by notice in one issue of any newspaper published within the county at least once a week, and that said board shall meet on the second Monday in August, to hear reasons, if any be given, why such increase should not be made; the board shall meet on the second Monday in August in each year to hear any person relating to any such increase in valuation; * * *".

It should be noted that said section provides for the giving of notice of an increased assessment to the person owning or controlling the property affected, by personal notice or through the mail, if address is known, and it is only where the address is unknown that publication of notice is permitted.

It has been held that notice, as the law directs, preliminary to an increase of a tax assessment, is essential to the validity of the assessment. State ex rel. Harrison County Bank v. Springer, 134 Mo. 212.

It therefore is the opinion of this office that where the address of the person owning or controlling property, in regard to which the assessed valuation has been increased, is known, notice of such increase can only be effected in person or by mail.

The answer to question No. 1 also disposes of question No. 2.

You next inquire whether the county board of equalization can legally and lawfully refuse to comply with the directive to raise the aggregate valuation of town lots. Section 138.030, RSMo 1949, relating to the powers and duties of county board of equalization, provides that in carrying out their duties in regard to intracounty equalization they shall not reduce the valuation of the real property of the county below the value thereof as fixed by the State Tax Commission. Said provision reads more fully as follows:

"* * * provided, that said board shall not reduce the valuation of the real or tangible personal property of the county below the value thereof as fixed by the state tax commission."

Honorable Ernest "Jack" Troutman

The question of the proper interpretation of this section has been before the Supreme Court of Missouri on several different occasions. In the case of State v. Bethards, 9 SW2d 603, 1.c. 605, the court said:

"* * * Therefore the county board of equalization of Shelby county had no authority to reduce the valuation fixed by the state board. When it attempted to equalize the values in accordance with the prior valuations fixed by the assessor, which valuations had been annulled by the order of the state board of equalization, the proceeding was a nullity. The entire proceeding of the county board in the matter was of no effect.* * *"

In the case of State v. Dirckx, 11 SW2d 39, 1.c. 41, the court said:

"* * * And when the state board in the discharge of this statutory function has determined and fixed the valuation of a class of property, the county board can neither increase nor reduce it. The principles determining this construction are so fully set forth in Mercantile Trust Co. v. Schramm, 269 Mo. 489, 190 S.W. 886, that a further elaboration of them is unnecessary. What the Cole county board of equalization did was to reduce the aggregate valuation of the class of property designated as 'banking corporations' 30 per cent. in order to equalize it with the valuations of other classes of property in Cole County; this it had no power to do, because it is perfectly obvious that the county board could not equalize valuations as between classes of property without changing the aggregate valuations thereof as fixed by the state board. The county board's authority is limited to equalizing valuations of property within a class. If it finds one piece of property within a class overvalued, it follows as a necessary implication that the remaining property in the class, or at least some of it, is undervalued. This for the reason that the valuation of the whole as a class, is fixed by the state board and that cannot be changed. A reduction of the valuation of one or more pieces of property therefore requires a corresponding increase of the valuation of some or all of the remaining property in the class."

In view of the foregoing-cited and noted statutory and case authorities, it is the opinion of this office that the county board of equalization cannot legally and lawfully disregard the aggregate valuation

Honorable Ernest "Jack" Troutman

of a class of property as fixed and determined by the state tax commission, but that in disregarding their duties in regard to intra-county equalization said aggregate valuation must be maintained.

We do not deem it either pertinent or necessary at this time to answer question No. 4. Further, said inquiry relates primarily to the duties of the state tax commission and to this office, in the event of litigation, rather than the duties of your office.

CONCLUSION

Therefore, it is the opinion of this office that, in the event a county board of equalization raises the assessed valuation of properties within the county, notice of such action should be given to the person owning or controlling the property affected, in person or by mail if the address is known, and that valid notice by publication can only be effected where the address of such person or persons is unknown.

It is the further opinion of this office that in performing their duties in regard to intracounty equalization, the county board of equalization must maintain the aggregate assessed valuation as previously fixed and determined by the state tax commission.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

Very truly yours,

John M. Dalton
Attorney General

DDG/ld

ELECTIONS: Persons registered under old law may vote at primary in Jackson County in 1956.



July 30, 1956

Mr. J. Vivian Truman
Chairman, Jackson County Board
of Election Commissioners
Jackson County Courthouse
Independence, Missouri

Dear Mr. Truman:

This opinion is submitted in reply to your recent inquiry regarding the conduct of the coming primary election in Jackson County outside of Kansas City.

Your Board has announced that persons who had registered under the prior registration law and who have not re-registered under the permanent registration law, enacted by the General Assembly in 1955, will be permitted to vote at the primary election on August 7, 1956. This announcement has been challenged and you have requested our opinion on the matter.

Prior to July 8, 1955, there was in effect in Jackson County (in all references herein to Jackson County the city of Kansas City is excluded) a system of registration of voters which required a general re-registration prior to each presidential election. That requirement was found in Section 113.670, RSMo, 1953 Supp., Laws of Missouri, 1951, page 817, and read, in part, as follows:

"The board of election commissioners and said judges and clerks shall constitute the board of registry and the judges and clerks of each precinct shall first meet under direction and control of the board of election commissioners in their respective precincts on Tuesday, five weeks before the next state, primary or general, election at the places designated by the board of election commissioners and then proceed to make a general registration of all voters in their respective precincts. The second day of registration being on Saturday following and

Mr. J. Vivian Truman

the third Tuesday, three weeks before such election. A general registration shall be made by the board of registry in every year thereafter in which a presidential election occurs and just prior thereto the first day of such registration being on Tuesday, four weeks before such election and the second day of such registration the Saturday following and the third day Tuesday three weeks before such election; * * *

Registration had been effected pursuant to the provisions of that act. Had the act remained in effect, the registration therein provided for would have been sufficient to entitle a person to vote at the primary election this year, re-registration not being required until four weeks before the November election.

However, by House Bill No. 414 of the 68th General Assembly, the above provision and all other provisions of the previous law relative to the registration of voters in Jackson County were repealed and a new system of permanent registration enacted (Sections 113.490 - 113.870, RSMo, 1955 Cum. Supp.). Said act contains the following provisions:

Sec. 113.490. "As used in sections 113.490 to 113.870, the following terms mean:

* * * * *

(2) 'Board', when used alone, the board of election commissioners;

(3) 'Election', any general, special, municipal or primary election, unless otherwise specified;

* * * * *

Sec. 113.500. "In all counties of this state now having, or which hereafter may have, four hundred fifty thousand inhabitants or over, there shall be a registration of all qualified voters; and the conduct of elections held in such counties shall be governed by the provisions of sections 113.490 to 113.870; * * *

Sec. 113.670. "The board shall constitute a continuing and continuous board of registry with full power and authority to register any

Mr. J. Vivian Truman

qualified voter in any precinct in the county at the office of the board or at such places as the board may designate. The board may designate registration days from time to time as the convenience of the inhabitants may require. Registration for any election shall be closed at the close of office hours on the third Wednesday prior to the day of election.
* * *

Sec. 113.850. "The vote of no person shall be received by the judges whose name does not appear upon the register as a qualified voter.
* * *

Said act also contained an emergency clause, which recited:

"Section 2. Because of the large volume of detailed work necessary to effect the purpose of this act in setting up a permanent registration of voters and the need for sufficient time to accomplish a general and permanent registration in time for the orderly conduct of the next general election in the county, this act is necessary for the immediate preservation of the public peace, health and safety, and an emergency exists within the meaning of the constitution; and this act shall be in full force and effect on and after its passage and approval."

The act was approved by the Governor on July 8, 1955, and by the terms of Section 29, Article III of the Constitution of Missouri, 1945, became effective on that date.

Section 1.020(3), RSMo 1949, provides:

"(3) 'General election' means the election required to be held on the Tuesday succeeding the first Monday of November, biennially."

The language of the emergency clause clearly indicated that the Legislature was primarily concerned that the system of permanent registration provided in House Bill No. 414 should be in effect at the general election to be held on November 6, 1956. The problem thus arises as to what the situation is with regard to the primary election to be held in August. Must all persons have re-registered

Mr. J. Vivian Truman

prior to that time under the new system in order to be qualified to vote at the primary election, or did the Legislature reserve to persons registered under the old system the right which they would have had thereunder to vote at the primary election this year without the necessity of re-registration?

In resolving this problem, there is a fundamental proposition which has been universally employed by the courts in the construction of election statutes. Such proposition has been stated as follows (29 C.J.S., Elections, Sec. 7, p. 27):

"Election laws will be strictly enforced to prevent fraud, but ordinarily will be construed liberally in favor of the right to vote. All statutes tending to limit the citizen in his exercise of the right of suffrage should be liberally construed in his favor. Where the elective franchise is regulated by statute, the regulation should, when and where possible, be so construed as to insure rather than defeat the exercise of the right of suffrage. Technicalities should not be used to make the right of the voter insecure. No construction of a statute should be indulged that would disfranchise any voter if the law is reasonably susceptible of any other meaning."

The right to vote is conferred upon citizens of Missouri meeting the qualifications prescribed by Section 2 of Article VIII of the Constitution of Missouri, 1945. Such right is, however, subject to legislative regulation. The Legislature is expressly authorized to enact statutes requiring the registration of voters (Sec. 5, Art. VIII, 1945 Const.). Insofar as we have been able to ascertain, no court in Missouri has passed upon the nature of the right of a voter who has registered under a law providing for registration for a limited period of time when the law has been changed prior to the expiration of such time. However, courts in other states have recognized that a voter who has complied with statutory requirements regarding registration thereby acquires a vested right to exercise the franchise subject to disqualification for other causes during the period of registration. In the case of *Ash v. Superior Court of San Bernardino County*, 33 Cal. App. 800, 166 P. 841, 1.c. 842, the court stated:

Mr. J. Vivian Truman

" * * * Primarily the register of elections is a public record created for the purpose of identifying qualified electors, in order to safeguard elections and preserve the purity of the ballot box. But it is equally true that a qualified elector who complies with the law has the personal right to have his affidavit of registration received and filed, and that it shall for the lawful period remain a part of the register. After his affidavit has been received and has become a part of the register of elections, he cannot be deprived of this right without some procedure which complies with the requirements of due process of law. * * *

The court further stated:

" * * * But if it be held that a valid judgment may be entered compelling the clerk to cancel a registration in an action wherein the person affected is not made a party defendant, such judgment would effectively stand in the way of any procedure against the clerk to compel recognition of the registered person's rights. He would have been deprived of a vested right without any opportunity to defend that right, and yet there would be no further legal remedy. * * *

Under the view of the court in that case, voters in Jackson County had acquired a vested right to remain on the register until after a primary election to be held this year. The Legislature was undoubtedly aware of the previously existing registration when it enacted House Bill No. 414. The language of the emergency clause, which may be considered in arriving at the legislative intent (82 C.J.S., Statutes, Sec. 345, p. 705), clearly indicated an intention on the part of the Legislature not to impair the rights of voters to participate in elections prior to the general election to be held this year, and it expressly indicated that it desired the new registration to become effective at that time. Thus, it appears to us that the Legislature has recognized the right of such persons and has sought to avoid possible constitutional questions which might have arisen should the Legislature have attempted to impair such right. Clearly, if such right were a vested right, the repeal of the former law could not impair such right without violating state and federal constitutional provisions. As stated in 16 C.J.S., Constitutional Law, Section 223, page 1182:

Mr. J. Vivian Truman

"Any right conferred by statute may be taken away by statute before it has become vested, but after a right has vested, repeal of the statute or ordinance which created the right does not and cannot effect such right."

See also Section 1.170, RSMo 1949; Section 13 of Article I, Constitution of Missouri, 1945.

(We must, of course, recognize that any right conferred upon a voter in such circumstances is not a wholly unqualified one because, otherwise, the conclusion would be required that should permanent registration once be enacted, the Legislature would be powerless to provide as to persons registered under such system that more frequent registration would be required. Such, however, is not the question presently presented.)

Thus, we have a situation in which although the Legislature might, had it seen fit, not have given recognition to the right of voters registered under the old law, it chose, quite possibly, in order to avoid constitutional questions, to recognize the right of voters under the old law. Such is, we feel, the only proper construction and effect which can be given to the emergency clause which was a part of House Bill No. 414. The Legislature having seen fit to recognize such right, we feel that the Jackson County Board of Election Commissioners is entirely justified in its position that for the 1956 primary election persons registered under the prior law retain the right to vote at such primary by virtue of such registration.

CONCLUSION

Therefore, it is the opinion of this office that persons registered under the previously existing registration law in Jackson County whose registration, but for the enactment of House Bill No. 414 of the 68th General Assembly, would have continued in effect until after the August 7 primary election are eligible, by virtue of such registration, to vote in such primary election.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

Yours very truly,

JOHN M. DALTON
Attorney General

RRW:ml

TRANSPORTATION:
INTOXICATING LIQUOR:

The moving of intoxicating liquor for even a very short distance constitutes "transportation" as that word is used in Section 311.410 RSMo 1949.



February 24, 1956

Honorable James A. Vickrey
Prosecuting Attorney
Pemiscot County
Caruthersville, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"Section 311.410 R.S.Mo., 1949, provides as follows. 'No person shall transport intoxicating liquor in, into or through the state of Missouri which has not been lawfully manufactured...' Section 311.460 makes violation of said provision a felony.

"It is my interpretation that the word 'in' means 'within' and concerns intrastate commerce while the words 'into or through' concerns crossing the state line and has to do with interstate commerce. It is also my interpretation that the word 'transport' means physical removal from one point to another by any means. In other words it appears to me that where unlawfully manufactured intoxicating liquor is moved by any means from one point within the state to another point within the state, even if only for a distance of a few feet, this section has been violated and a felony has been committed, otherwise the word 'in' is surplusage. However, in view of the fact that the Legislature has used the word 'within' in Section 311.420, may make my interpretation unsound. The latter section provides that 'No person shall transport into, within or through the state of Missouri any intoxicating liquors in quantities larger than five gallons...'.
"

"This question is very important in connection with a case now pending and in which a guilty plea is anticipated and also in another case presently

Honorable James A. Vickrey

under investigation.

"Therefore your opinion, at your earliest convenience, is respectfully requested on the following specific question, to-wit:

"1. Where a person in actual possession and control of intoxicating liquor by him known to have been unlawfully manufactured, personally, and by physical acts, moves a quantity of such liquor from one location, such as a still, to another location a short distance away, such as a nearby dwelling house, and where the journey is by foot and wholly within the state of Missouri, has that person acted in violation of the first sentence of Section 311.410 R.S.Mo., 1949, so as to be guilty of a felony?"

We believe that there can be no doubt that the word "in", as used in the first line of Section 311.410 RSMo 1949, has the same meaning as "within", and means the moving of intoxicating liquors from one point within the state of Missouri to another point within the state, as from Caruthersville to Kennett. If this is not the meaning, then the word "into," which follows "in," is duplicitous and without meaning.

Your next question is what constitutes "transportation" as that word is used in Section 311.410, supra. In that regard we direct attention to the following cases.

In the case entitled "Liquor Transportation Cases," 205 SW 423, 428, the Supreme Court of Tennessee held that the carrying of intoxicating liquors from a train to the depot platform constituted "transportation" as that word was used in the liquor laws of Tennessee.

In the case of Caudill v. Commonwealth, 254 SW 745, the Supreme Court of Kentucky held that the carrying of whisky "a short distance" from a house for the purpose of destroying it as evidence constituted "transportation".

In the case of State v. Lando, 300 SW 767, the Missouri Supreme Court held that an information was not defective for failing to allege from and to what places intoxicating liquor was transported in a charge of illegally transporting intoxicating liquor, since it was the act of transporting which constituted the offense.

In the case of State v. Brown, 296 SW 125, the Missouri Supreme Court, at l.c. 126, states:

Honorable James A. Vickrey

"It fails to allege that defendant was transporting intoxicating liquor from any place to any place. Section 19 of the act of 1923 (Laws 1923, p. 242) defines transportation as conveying intoxicating liquor 'from place to place.' Appellant's counsel seems to interpret that expression to mean that there must be some definite shipping point and some definite destination. In the commercial world, when goods are shipped from one person to another, usually there is a consignor, a consignee, and a carrier. The qualifying words in section 19 make it an offense to carry the liquor in any container or receptacle of whatsoever kind or character, and by whatever means used, 'except carrying on the person.' There is no limit as to the purpose of the transportation, nor as to the parties interested in it. It includes transportation for the carrier's own purpose. It does not matter where the transportation begins nor where it ends; it is the act of carrying that constitutes the offense. Neither destination nor distance is important. The information is not open to that objection."

In your letter you do not state the exact distance that this intoxicating liquor was transported or carried. However you can measure this carrying of distance in the light of the above and conclude whether it comes within the meaning of the word "transportation". As a matter of fact, it would appear that almost any moving would come within the definition.

CONCLUSION

It is the opinion of this department that the moving of intoxicating liquor for even a very short distance constitutes "transportation," as that word is used in Section 311.410 RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW/ld

MOTOR VEHICLES:
ROADWAYS:
PLACE OF DRIVING:

A motorist who operates a motor vehicle upon a one-way roadway in such a manner as to endanger the life or property of others may be prosecuted therefor.



January 31, 1956

Colonel Hugh H. Waggoner
Superintendent
Missouri State Highway Patrol
Jefferson City, Mo.

Dear Sir:

Your recent request for an official opinion reads:

"We have received the following letter from Captain L. B. Howard, Commanding Officer of Troop I at Rolla, Missouri:

"U. S. Highway 66, through the greater part of Troop I area, is a "highway or road which has been divided into two or more roadways by means of a physical barrier or by means of a dividing section or delineated by curbs, lines or other markings on the roadway..." Quotation from Chapter 304.015, paragraph 4, 1953 Supplement to R. S. Mo. 1949.

"There is apparently no section of our present Traffic and Equipment Regulations which requires a driver to keep as far to the right side of the right hand roadway of a dual highway as practicable. One case charging careless and imprudent driving by weaving from side to side of the roadway has been acquitted. Quite recently, a driver, by weaving from side to side of the roadway, caused an accident resulting in the serious injury of another driver who was attempting to pass, properly, after signalling with his horn, as required. Neither driver was intoxicated.

"Local magistrates and prosecuting attorneys feel that some means of prosecuting a 'weaving' driver should be found and are anxious to cooperate."

"It is respectfully requested that you furnish us with an official opinion regarding the inquiry from Captain Howard as stated above."

Colonel Hugh H. Waggoner

All references to statutes will be to the Missouri Revised Statutes 1949, unless otherwise indicated.

Section 304.015 (Missouri Revised Statutes, Cumulative Supplement 1953) reads in part as follows:

(Paragraph 2, subparagraph 4) "2. Upon all public roads or highways of sufficient width a vehicle shall be driven upon the right half of the roadway, except as follows:

"(4) Upon a roadway designated by markings or signs for one-way traffic."

From the above, as you deduce, it clearly appears that on a one-way roadway, there is no requirement that a motorist drive on the righthand side of the roadway. It appears indeed that the law has taken care to make quite clear that no such requirement exists.

In regard to a prosecution under the fact situation set forth by you, we direct attention to the following portion of Section 304.010:

"Every person operating a motor vehicle on the highways of this state shall drive the same in a careful and prudent manner, and shall exercise the highest degree of care * * *."

We also direct attention to the following portion of Section 304.019, Missouri Revised Statutes, Cum Supp. 1953:

"No person shall stop or suddenly decrease the speed of or turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety and then only after the giving an appropriate signal in the manner provided herein."

We believe that an information drawn as above indicated would secure conviction, provided of course that the testimony adduced sustained the charge.

Colonel Hugh H. Waggoner

CONCLUSION

It is the opinion of this department that a motorist who operates a motor vehicle upon a one-way roadway in such a manner as to endanger the life or property of others may be prosecuted therefor.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW/ld

COUNTY COURT: After allocating federal flood control funds to schools and for roads, county
FLOOD CONTROL ACT: court may exercise discretion in using balance for any proper county purpose.



March 1, 1956

Honorable J. S. Wallace
Member, House of Representatives
Sikeston, Missouri

Dear Mr. Wallace:

This is in response to your request for opinion dated February 17, 1956, which reads as follows:

"A request has come to me for an opinion on the new law regarding distribution of federal revenue received by counties concerning lakes and reservoirs.

"We are particularly interested concerning Clearwater Lake Reservoir in Reynolds County. The question is, does the county court have authority to use the funds from the Clearwater Lake Reservoir as they see fit, for the needs of the county, or are they required by law to divide the revenue from this source among the respective funds."

Clearwater Lake Reservoir is a Federal Flood Control project. The Federal Flood Control Act provides for the payment to the states of seventy-five per cent of the proceeds received from leased lands in such projects, to be paid to the states and distributed as the legislature may provide. This provision is found in Section 701c-3 of Title 33, USCA, and reads as follows:

"75 per centum of all moneys received and deposited in the Treasury of the United States during any fiscal year on account of the leasing of lands acquired by the United States for flood control, navigation, and allied purposes, including the development of hydroelectric power, shall be paid at the end of such year by the Secretary of

Honorable J. S. Wallace

the Treasury to the State in which such property is situated, to be expended as the State legislature may prescribe for the benefit of public schools and public roads of the county, or counties, in which such property is situated, or for defraying any of the expenses of county government in such county or counties, including public obligations of levee and drainage districts for flood control and drainage improvements: Provided, That when such property is situated in more than one State or county, the distributive share to each from the proceeds of such property shall be proportional to its area therein."

Pursuant to the federal statute, the Missouri Legislature has enacted statutes providing for the distribution of the funds received under this act by counties. The present provisions are found in Sections 12.080 and 12.100, RSMo, 1955 Supp. Said sections read as follows:

Sec. 12.080.

"All sums of money heretofore received or that may hereafter be received from the United States, or any department thereof under an act of congress approved August 18, 1941, being an act providing for the payment to the several states of seventy-five per cent of all moneys received for leases of land situated in the various states to which the United States owns fee simple title under the Flood Control Act of May 15, 1928, as amended and supplemented, to be expended as the general assembly may prescribe for the benefit of the public schools and public roads of the county or counties in which such government land is situated, or for defraying any of the expenses of county government in such county or counties, including public obligations of levee and drainage districts for flood control and drainage improvements, or as provided by any acts of congress authorizing the distribution of income or revenue from such lands owned by the United States of America or any of its departments, bureaus or commissions or any

Honorable J. S. Wallace

agency of the United States of America, to states or counties or as provided by any amendments to said acts, shall be expended as the county court of the county entitled to receive such funds may direct in accordance with the provisions and regulations as have been or may be in the future provided by the acts of congress providing for such distribution to states and counties."

Sec. 12.100.

"It shall be the duty of the county court of each county receiving any such moneys to use such funds to aid in maintaining the schools and roads and for defraying any of the expenses of the county in accordance with the provisions set forth in sections 12.070 and 12.080. The county court shall allow to the school districts and for roads an amount based upon their respective levies, equal to that which would ordinarily be allowed to them out of taxes from property owned by the United States if the property were privately owned before using any of such moneys for defraying other expenses of the county." (Emphasis ours.)

These sections were enacted by House Bill No. 109 of the 68th General Assembly. We have indicated the new material added by that bill by underscoring in the above quotations of the present statutes.

Under similar statutes, the courts have held that the federal statute leaves to the state legislature discretion as to the distribution of funds received. *King County Washington v. Seattle School Dist. No. 1*, 263 U.S. 361, 44 S. Ct. 127, 68 L. Ed. 399.

Prior to the 1955 amendments to the Missouri statutes, provision was made by the Missouri Legislature for the use of the funds for road and school purposes only. The 1955 amendments extended the purposes for which such funds might be used by the counties to encompass matters which had previously been authorized under the federal statutes.

By Section 12.100, supra, the Missouri Legislature has, in effect, given priority to schools and roads in the distribution of the funds received from the federal government. Upon the receipt of such funds, the county court is required first to allocate to the schools and for roads an amount computed as provided in said section. Insofar as any remaining balance is concerned, the

Honorable J. S. Wallace

Legislature has made no express provision regarding its allocation by the county court. Consequently, its allocation would be a matter within the discretion of the county court. The courts have recognized that the Constitution and the Legislature have entrusted some discretion to the county courts in the management of the county's fiscal affairs. Thus, in the case of *State ex rel. Floyd v. Philpot*, 364 Mo. 735, 266 SW2d 704, 1.c. 710, the court stated:

"County courts are not now named among the 'constitutional courts' in which the judicial power of the state is vested, Article V, Constitution of Missouri 1945, V.A.M.S., but such courts are recognized in the Article treating with 'Local Government,' and they are given authority to 'manage all county business as prescribed by law'. Section 7, Article VI, Constitution of Missouri 1945, V.A.M.S. The authorities are uniform to the effect that, outside of the management of the fiscal affairs of the county, such courts possess no powers except those conferred by statute. * * *"

See also *Everett v. County of Clinton*, 282 SW2d 30, 41.

In view of the absence of any express direction by the Legislature as to the allocation by the county court of any balance of funds remaining after the allocation required to be made to the schools and for road purposes, we must conclude that the Legislature has left the question for the county court to handle in the sound exercise of its discretion. The court may, therefore, allocate such money to any of the county funds which the county court might select.

CONCLUSION

Therefore, it is the opinion of this office that, under the provisions of Sections 12.080 and 12.100, RSMo, 1955 Supp., the county court, after allocating flood control moneys received from the federal government to schools and for roads as required by Section 12.100, may use the balance available for such proper county purposes as the court in its discretion may select.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

Yours very truly,

JOHN M. DALTON
Attorney General

COUNTIES: CLASSIFICATION OF
COUNTIES: MUNICIPALITIES:
CITIES: POLICE: POLICE
RETIREMENT SYSTEMS: FIREMEN:
FIREMEN'S RETIREMENT SYSTEMS:
FIRE DEPARTMENTS:

The City of St. Louis is not a city in a county of the first class within the provisions of Section 86.400 RSMo Cumulative Supplement, 1955.



April 2, 1956

Honorable Eugene P. Walsh
Member of the House of Representatives
705 Olive Street
St. Louis 1, Missouri

Dear Mr. Walsh:

You recently requested an official opinion of this office concerning the following question:

"Would you please forward to me at your earliest convenience, an opinion of your office on the following question:

"Would the following words in Section 86.400 of the Revised Statutes of Missouri, 1949, as amended, apply to the City of St. Louis if it had no established fire department retirement system, or, if the present fire department retirement system were to be repealed by statute, 'any municipality in any county of the first class', or must this clause be read together with the population limitation clause that follows and which reads, 'and any other municipality in this state which now contains more than 100,000 inhabitants or less than 3,000 inhabitants, etc.'."

"In other words, must the 'municipality in any county of the first class' have not more than 100,000 inhabitants to take advantage of the provisions of this section, or does this section extend its provisions to two separate types of municipalities, "(1) Any

Honorable Eugene P. Walsh

municipality in any county of the first class" and also to, "(2) Any other municipality in the state which now contains or may hereafter contain not more than 100,000 or less than 3,000 inhabitants".'

"I ask the foregoing on the premises that St. Louis is both a municipality and a county of the first class, as held in some of your prior opinions, and also with the realization that if the clause in question does apply to St. Louis it could only take advantage of same, if it first repealed the statutes relating to its existing retirement system."

Section 86.400 RSMo 1955 Cumulative Supplement, to which you refer, reads in the pertinent part as follows:

"Any municipality in any county of the first class, and any other municipality in this state which now contains or may hereafter contain not more than one hundred thousand inhabitants nor less than three thousand inhabitants . . ."

By this language this statute creates two classifications of municipalities to which it may apply: (1) A municipality in a county of the first class; (2) A municipality of over three thousand and less than 100,000 inhabitants. It is clear that St. Louis cannot come within the second classification since it has more than 100,000 inhabitants. As to whether or not St. Louis may come within the classification of "any municipality of any county of the first class" presents a much more difficult question. By Article VI, Section 31 of the Missouri Constitution of 1945, the City of St. Louis is specifically recognized as a city and as a county. Further, by Article X, Section 11 (d) the City of St. Louis is authorized to levy taxes for county purposes in addition to the taxes it may levy for city purposes. The Supreme Court of Missouri, in the case of *Walters v. City of St. Louis*, 259 SW2d 377, 364 Mo. 56, likewise recognized that under the Constitution the City of St. Louis was both a county and a city, and in the case of *State ex rel. Hart v. City of St. Louis*, 356 Mo. 820, 204 SW2d 234, the court emphasized that the City of St. Louis had separate powers, those of a county as well as those of a city, and that it was, in fact, both a city and a county. This

Honorable Eugene P. Walsh

office has previously held in an opinion dated October 9, 1946, to the Honorable David A. McMullan, 418 Olive Street, St. Louis 2, Missouri, that under the classifications of counties authorized and required by Article VI, Section 8 of the Constitution the City of St. Louis would in its capacity as a county constitute a county of the first class. Copy of such opinion is enclosed herewith for your information.

On the other hand the Legislature has in several instances, when enacting statutes pertaining to the City of St. Louis, used the classification of a constitutional charter city not within any county. As an example of this see the provisions for the assessment and collection of taxes found in Sections 137.485, et seq., RSMo 1949, and Sections 138.140, et seq., RSMo 1949. Thus it appears that while the City of St. Louis has the powers of a county and when exercising such powers constitutes a first class county, the Legislature has, when making a classification for the purpose of legislation affecting the City of St. Louis, used the description of such class as "constitutional charter cities not situated within any county."

Further, it must be remembered that Section 86.400 RSMo Cumulative Supplement 1955, cannot be considered in a vacuum but must be construed with regard to the system of which it is a part. Chapter 86, RSMo 1949, as amended, provides for police and firemen's relief and pension systems under nine different classifications. One of which is that found in Section 86.400. Police retirement systems and firemen's retirement systems are provided by numerous sections of said chapter which apply only to cities of over 500,000 inhabitants, and thus, it would appear that it was the intent of the Legislature for such statutes affecting cities of over 500,000 inhabitants to apply to the City of St. Louis, and that it was not the intention of the Legislature that the classifications of "any municipality in any county of the first class" should include the City of St. Louis. This especially since the Legislature has often described the City of St. Louis as a constitutional charter city not within any county.

CONCLUSION

It is, therefore, on the basis of the foregoing, the conclusion of this office that the City of St. Louis does not come within the classification of "any municipality in any county of the first class" found in Section 86.400 RSMo Cumulative Supplement 1955, and that

Honorable Eugene P. Walsh

even if the statutes providing for police and firemen's retirement systems specially applicable to the City of St. Louis were repealed, that the city would not be authorized to take action under said Section 86.400.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Fred L. Howard.

Yours very truly,

John M. Dalton
Attorney General

FLH:vlw;sm
Enclosure

NEPOTISM: School director voting to appoint one to fill vacancy on board of which he is a member; appointee being step-son of director's wife's uncle; there is no relationship between director and appointee within fourth degree either by consanguinity or affinity and director does not violate nepotism provision of Art. 7, Sect. 6, Constitution of Missouri 1945, and does not forfeit office.

August 27, 1956

Filed: #93

Honorable Wayne W. Waldo
Prosecuting Attorney
Pulaski County
Waynesville, Missouri



Dear Mr. Waldo:

This department is in receipt of your recent request for a legal opinion which reads as follows:

"The opinion of the Attorney General is respectfully requested on the following situation which has arisen in Pulaski County. Laquey Reorganized School District R-5 has a board of Directors composed of six men. One of these men resigned. Four of the five remaining Directors were present at the meeting at which a new man was appointed to take the place of the man who resigned. One of the four men present at the meeting was related to the man who was appointed in the following manner. The board member, whom we shall designate by the letter A is married to a woman whom we shall designate by the letter W, the mother of wife W has a brother whom we shall designate by the letter B. The man who was appointed to the School Board is the step-son of this brother B, since brother B married the mother of the step-son (designated by the letter S) who was appointed to the School Board.

"The following questions are posed.

1. Does such an appointment come within the provisions of Section 163.080, MRS 1949?
2. Does such an appointment come within the provisions of Article VII, Section 6, of the Missouri Constitution?

Honorable Wayne W. Waldo

3. Is the Board Member A related to the new Board Member S within the fourth degree, either by consanguinity or affinity?
4. If such an appointment is illegal because of nepotism, does Board Member A forfeit his office, and what is the proper procedure to enforce the forfeiture of his office?
5. If such an appointment is illegal, does the new Board Member S forfeit his office, was his appointment proper, and what is his present status as a Board Member?

"Any assistance you can render to this office in this situation will be greatly appreciated."

From the facts given in the opinion request, and supplemental information pertaining to same, it appears that the Board of Directors of Laquey Reorganized School District R-5 of Pulaski County was composed of six members until a vacancy was created when one of them resigned. Thereafter, at a meeting of the board, four of the five remaining members were present, and a successor was chosen to fill the vacancy. All four directors present, including A, voted for S, who was appointed to fill said vacancy. Director A's wife is referred to as W. W's mother has a brother B, and B is married to the mother of S. B's stepson S, is the newly appointed board member. These facts have given rise to the six questions presented in the opinion request. The first question inquires if the appointment (of S) comes within the provisions of Section 163.080, RSMo 1949.

Section 163.080, RSMo 1949, empowers the board, at a regular or special meeting called after the annual school meeting, to contract with and employ legally qualified teachers for the district and specifies what such contract shall contain and by whom it shall be executed. The provisions of the section also prohibit the board from employing one of its members as a teacher, or the employment of a teacher related to any board member within the fourth degree either by consanguinity or affinity where the vote of the board member is necessary to the selection of such teacher.

We take it that the first question inquires whether or not that portion of Section 163.080, RSMo 1949, containing the prohibition against a board member voting to employ a teacher related to him within the fourth degree either by consanguinity or affinity applies to the facts stated in the opinion request.

Honorable Wayne W. Waldo

Our answer to the first question is in the negative, since the nepotism provision of the section prohibits the board from employing teachers related to board members within the prohibited degree, and has no reference to the appointment of new members to fill vacancies on the board, and the relationship of the board members to appointees, within the fourth degree either by consanguinity or affinity.

The second inquiry reads as follows:

"2. Does such an appointment come within provisions of Article VII, Section 6, of the Missouri Constitution?"

In an opinion of this department rendered to Honorable James T. Riley, Prosecuting Attorney of Cole County, Missouri, it was held that a school director was a public officer within the meaning of the constitutional provision. Said opinion is believed to fully answer the inquiry, and a copy of same is enclosed for your consideration.

The third inquiry of the opinion request reads as follows:

"Is the Board Member A related to the new Board Member S within the fourth degree, either by consanguinity or affinity?"

The facts presented in your letter do not state any blood relationship between Director A and new Director S and if any relationship exists at all between the parties, it is by affinity.

The following definition of the term affinity was given in the case of State vs. Ellis, 28 SW2d 363, at l.c. 366:

"Affinity is defined as a legal relationship which arises as the result of marriage ' * * * between each spouse and the consanguinal relatives of the other.'

"That is, the husband is related by affinity to his wife's relatives in the same way that she is related to them by blood, and she is related to his relatives by affinity in the same way that he is related to them by blood."

It was held in this case that when a circuit clerk and a county clerk appointed their wives as deputies, they forfeited their offices, since the wives were related to their husbands by affinity within the meaning of nepotism as defined in Art. 14, Sect. 13 of the Constitution.

Honorable Wayne F. Waldo

Again in the criminal case of State vs. Thomas, 174 SW2d 337, one of the assignments of error briefed and argued in the appellate court was that the prosecutrix was related to a juror by affinity within the degree prohibited by statute, since the juror stated his sister was the wife of a brother of the prosecutrix's husband, or a brother-in-law of a brother-in-law of prosecutrix. The Court overruled appellant's contention and at 1.c. 338 said:

"1. But the statute does not specify how the prosecutrix and the juror must be related: Whether by consanguinity or affinity. He was not related by consanguinity. Was he, by affinity? In State v. Carter, 345 Mo. 74, 77(3), 131 S.W. 2d 546, 548(4), a female cousin of the juror's wife had married a brother of the defendant. The case ruled this did not constitute a relationship forbidden by the statute. The same ruling must be made here. A kinship by affinity--arising through marriage--exists only between each spouse and the blood relatives of the other spouse. Here, juror Burns was not blood kin of the prosecutrix' husband, and therefore was not related to her by affinity. It results that he was not of kin to her at all, and the assignment must be overruled."

Looking at the facts, it is readily seen that while B is W's uncle (by blood), the relationship between B and B's wife's son by a former marriage is that of stepfather and stepson and is only by affinity. W's mother is a sister-in-law to her brother B's wife, but B's wife or her son are not related to W since the relationship would be by affinity on affinity, and the rule does not recognize relationship of this kind. Since W is not related in any degree to S, it must and does follow that W's husband A is also not related in any degree to S.

Therefore in answer to the third inquiry it is our thought that board member A is not related to new board member S within the fourth degree either by consanguinity or affinity. By voting for the appointment of S to fill the vacancy on the board, A did not violate the nepotism provisions of Art. 7, Sect. 6 of the Missouri Constitution of 1945, and his action in that respect was proper.

Apparently inquiries 4 and 5 were meant to be answered only if the answer to inquiry 3 was in the affirmative. Since the answer to that inquiry was in the negative, it is believed to be unnecessary to discuss or answer inquiries 4 and 5.

Honorable Wayne F. Waldo

CONCLUSION

It is therefore the opinion of this department that a school director voting to appoint one to fill a vacancy on the board of which he is a member, when said appointee is the stepson of the director's wife's uncle, there is no relationship between the director and such appointee within the fourth degree, either by consanguinity or affinity, and the director does not violate the nepotism provisions of Article 7, Section 6, Constitution of Missouri, 1945, and does not forfeit his office.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Paul N. Chitwood.

Very truly yours,

John M. Dalton
Attorney General

PNC:gm

Enclosure

NEPOTISM: A school board member is not related in fourth degree, either by consanguinity or affinity, within meaning of Art. VII, Sec. 6, Const. of Mo., 1945, (1) to a bus driver of district whose wife is first cousin of board member's wife or (2) to a bus driver of district who is brother-in-law of wife of board member.



September 17, 1956

Honorable Wayne W. Waldo
Prosecuting Attorney
Pulaski County
Waynesville, Missouri

Dear Mr. Waldo:

We are in receipt of your recent request for our legal opinion, reading in part as follows:

"At a meeting of a Board of Directors a contract to drive a bus was awarded to one Emerson Storie. Board Member 'A' is related to bus driver Emerson Storie in the following manner. The wife of Board Member 'A' is a first cousin to the wife of Bus Driver Emerson Storie, since the mother of the wife of Board Member 'A' is a sister to the father of the wife of Bus Driver Emerson Storie. The questions presented here are as follows:

1. Is Board Member 'A' related within the fourth degree to Bus Driver Emerson Storie?

2. If they are related, is this in violation of the nepotism sections since all six of the members were present and all voted unanimously to approve the contract with bus driver Emerson Storie?

3. If they are related, and if the action of Board Member 'A' was illegal, would it have been proper for Board Member 'A' to refrain from voting, even though present at the meeting, and let the other five members who were present at the Board approve the contract with Bus Driver Emerson Storie?

Honorable Wayne W. Waldo

"At a meeting of the Board of Directors of Laquey Reorganized School R-5 the salary of a Bus Driver Snowden Quesenberry was raised \$12.50 per month. All six of the Board Members were present and voted unanimously to approve the raise in pay. Board Member 'S' is related to bus driver Snowden Quesenberry in the following manner: They are brothers-in-law, since the wife of board member 'S' is a sister to the wife of bus driver Snowden Quesenberry. The following questions are posed by the situation:

1. Is board member 'S' related within the fourth degree to bus driver Snowden Quesenberry?

2. Is the raising of the salary of the bus driver such an action or appointment as to come within the provisions of section 163.080, MRS 1949 or Article VII, Section six of the Missouri Constitution?

3. If such an appointment on the part of Board Member 'S' is illegal because of nepotism, does board member 'S' forfeit his office, what is the proper procedure to enforce such a forfeiture, and what is the status of the contract with bus driver Snowden Quesenberry?"

Our legal opinion written for you on August 27, 1956, involves the school district and individual members of the board of directors that are referred to in the present opinion request.

From the facts presented, it appears that Board Member A's wife's mother is a sister to the father of the wife of Bus Driver Emerson Storie, and A's wife and Storie are first cousins. Since there is no indication to the contrary, we assume no blood relationship exists between A and Storie, or between A's wife and Storie, and if there is any relationship between these parties it could be only by affinity.

Referring to the facts again, we find that Storie is related to his wife's blood relatives in the same degree as she is, by affinity, although he would not be related in any degree to his

Honorable Wayne W. Waldo

wife's relatives by affinity. While Storie's wife and her cousin's husband A are related only by affinity, Storie and A are not related in any degree since this could be only by affinity on affinity, which is not recognized as relationship in any instance.

In answer to the first inquiry, it is our thought that Board Member A and Emerson Storie are not related to each other in the fourth degree either by consanguinity or affinity.

The second and third inquiries appear to require answer only if the first answer is in the affirmative. Since the first inquiry was answered in the negative, it is believed that answers to the second and third inquiries are not required.

From the second statement of facts of the opinion request, it appears that at a meeting of the board of directors of said Laquey Reorganized School District R-5, the six board members present voted to increase the salary of Bus Driver Snowden Quesenberry \$12.50 per month. Board Member S is said to be related to the bus driver as a brother-in-law, since S's wife is a sister to the bus driver's wife.

The first inquiry on the second statement of facts asks if Board Member S is related within the fourth degree to Bus Driver Snowden Quesenberry.

In our previous discussion it was pointed out that the blood relatives of one spouse are related to the other spouse in the same degree, but by affinity. The husband and wife are said to be related by affinity, but the relatives of one spouse by affinity are not related in any degree to the other spouse, as relationship by affinity on affinity is not recognized.

In answer to the first inquiry upon the second statement of facts, it is our thought that Board Member S and Bus Driver Snowden Quesenberry are not related to each other in the fourth degree, either by consanguinity or affinity.

In view of the negative answer given to the first inquiry, it is believed to be unnecessary to answer the second and third inquiries.

CONCLUSION

It is therefore the opinion of this department that a member of a school board is not related in fourth degree, either by

Honorable Wayne W. Waldo

consanguinity or affinity, within the meaning of Article VII, Section 6, Constitution of Missouri, 1945, (1) to a bus driver of the district, whose wife is a first cousin of the wife of the board member, or (2) to a bus driver of the district, who is a brother-in-law of the wife of the board member.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Paul N. Chitwood.

Yours very truly,

JOHN M. DALTON
Attorney General

PNC: gm;ml

HIGHWAY COMMISSION: State Highway and its agents not liable for tres-
TRESPASSING: passing when entering upon private property for
SURVEYS: purpose of making preliminary survey.



June 4, 1956

Honorable Charles A. Weber
Prosecuting Attorney
Ste. Genevieve, Missouri

Dear Mr. Weber:

This will acknowledge receipt of your request for an opinion
which reads:

"I would like to have an official opinion
based on the following facts:

"The survey for the relocation of U. S.
Highway No. 61 is now being made in Ste.
Genevieve County. Several land owners have
contacted this office regarding the surveyors
who are making this survey in an effort to
have them prosecuted for trespassing. It is
my contention that the last sentence of Sub.
Section 13 of Section 227.120 V.A.M.S. of
1949 gives the State Highway Commission and
its agents the authority to trespass upon
private property in determining the route
for this particular highway.

"Is my contention correct?"

Section 227.120, MoRS 1949, referred to in your request, reads,
in part:

"The state highway commission shall have power
to purchase, lease, or condemn, lands in the
name of the state of Missouri for the following
purposes when necessary for the proper and eco-
nomical construction and maintenance of state
highways:

* * * * *

Honorable Charles A. Weber

"13. Acquiring lands for any other purpose necessary for the proper and economical construction of the state highway system for which the commission may have authority granted by law. If condemnation becomes necessary, the commission shall have the power to proceed to condemn such lands in the name of the state of Missouri, in accordance with the provisions of chapter 523, RSMo 1949, insofar as the same is applicable to the said state highway commission, and the court or jury shall take into consideration the benefits to be derived by the owner, as well as the damage sustained thereby. The state highway commission also shall have the same authority to enter upon private lands to survey and determine the most advantageous route of any state highway as granted, under section 388.210, RSMo 1949, to railroad corporations."

Section 388.210, MoRS 1949, referred to in the foregoing statute reads, in part:

"Every corporation formed under this chapter shall, in addition to the powers herein conferred, have power:

"(1) To cause such examination and survey for its proposed railroad to be made as may be necessary to the selection of the most advantageous route, and for such purpose, by its officers, agents or servants, to enter upon the lands or waters of any person; but such corporation shall be liable and subject to responsibility for all damages which shall be done thereto;"

The basic rule of construction of a statute is first to seek the lawmakers' intention and, if possible, to effectuate that intention. *Laclede Gas Co. vs. City of St. Louis*, 253 S.W.(2d) 832, 363 Mo. 842.

Another well established rule of statutory construction is that when the meaning of a statute is plain and unambiguous there is no room for statutory construction. *Steggall vs. Morris*, 258 S.W.(2d) 577, 363 Mo. 1224.

It is evident under Section 227.120, supra, that the Legislature has specifically provided that the State Highway Commission shall have the same authority to enter upon private lands to make surveys for

Honorable Charles A. Weber

proposed state highways the same as is provided for railroad corporations under Section 388.210, supra. The authority granted under the latter statute is that such corporations may, in addition to other powers granted therein, enter upon lands or waters of any person for the purpose of making a survey for a proposed railroad.

The law has been well established in this state for a long time that the Legislature could authorize such entries on private property for making a preliminary examination and survey. See Walther vs. Warner, 25 Mo. 277, l.c. 289 and 290.

CONCLUSION

It is the opinion of this department that you are correct in holding that the State Highway Commission and its agents are vested with authority to enter upon private property for the purpose of making a preliminary survey for locating a highway and in so doing they cannot be prosecuted for trespassing thereon.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

John M. Dalton
Attorney General

ARH:mw

SCHOOLS: Institutions of higher learning ineligible
SCHOOL DISTRICTS: for apportionment of state school money under
STATE SCHOOL MONEYS: Senate Bill No. 3 or House Bill No. 182,
68th General Assembly.



February 17, 1956

Honorable Hubert Wheeler
Commissioner of Education
Department of Education
Jefferson Building
Jefferson City, Missouri

Dear Mr. Wheeler:

This is in response to your request for opinion dated
November 8, 1955, which reads as follows:

"The question has arisen in this state whether or not state institutions of higher learning are eligible to participate in the apportionment of state school moneys. More specifically the question at issue is whether state colleges and universities are eligible to receive state aid under Senate Bill No. 3, the Foundation Program, and House Bill No. 182, the school Transportation Act. Applications have been received which requests money on the basis of (1) teacher incentive, (2) flat grant, and (3) transportation aid. In order to determine the eligibility of these state institutions under the new laws this Department desires your legal construction and interpretation.

"Under the 1931 laws providing for the apportionment of state school moneys, state tuition and transportation aid was paid for nonresident high school pupils who attended an approved high school maintained in connection with state institutions of higher learning. Authority for such payments was based on Sections 165.257, 165.143, and the opinion of the Attorney General dated January 6, 1937. Section 165.257 requires school boards in districts that do not maintain an approved high school to pay the

Honorable Hubert Wheeler

tuition to an approved school outside the district. Included with the approved high schools are those maintained by state institutions of higher learning. The state was authorized to pay tuition up to \$50 to the district in which the pupil attended high school.

"Section 165.143, RSMo 1949, provided that when districts admitted nonresident pupils to its high school and made provision for transporting them, such district should receive transportation aid at a rate not to exceed \$3 per month per pupil transported; such payment to be a part of the state's apportionment to the district.

"The Attorney General ruled on January 6, 1937, that state institutions of higher learning were entitled to state aid for the transportation of high school pupils. The opinion also held that it was not necessary to determine whether or not a state college was a school district. On the basis of these laws and the official opinion, tuition and transportation aid has been paid to state institutions of higher learning when they maintained an approved high school, admitted nonresident pupils, and provided approved transportation. You will observe that this law made no special requirement for receiving such aid except that the district provide an approved high school.

"Two new laws have been enacted and are now in operation, namely Senate Bill No. 3, the Foundation Program, and House Bill No. 182 authorizing transportation aid. The Foundation Program does not provide for the apportionment of tuition aid, but has provided for a flat grant at the rate of \$75 for each nonresident pupil whose tuition the home district is required to pay. Such aid seems to be in part a substitution for what was formerly known as high school tuition aid.

Honorable Hubert Wheeler

"Senate Bill No. 3 establishes some specific requirements for all school districts to meet before qualifying for any apportionment under this act, such as a minimum school term; keeping adequate records; and levying a minimum tax rate. Section 2 of this act provides that a school district shall receive state aid for its educational program only if it meets certain requirements; chief of which is that a \$1 tax rate for school purposes shall be levied.

"Several school districts in the state this year have not levied the required \$1 tax rate and cannot receive state aid under the new law for the current year. This requirement is general and does not seem to permit exceptions. State institutions of higher learning cannot levy taxes, therefore seem to be eliminated from participating in the state apportionment the same as school districts that fail to levy the required tax rate. Under the old law, all school districts were entitled to receive an apportionment of some kind. The new act is a departure from the old, in that all school districts must meet certain specific requirements in order to receive any state aid.

"Senate Bill No. 3 incorporates all special aid laws and makes them a part of the regular annual apportionment of state school moneys. The Supreme Court, in 66 S.W. (2d) 521, ruled in reference to the incorporated sections of state aid laws that the school district was not entitled to priority of payment when statutes provided that such state laws were incorporated in another statute which contained a provision that money should be apportioned pro rata as money available in the public school funds would permit, in event funds were not sufficient for all purposes. Transportation aid is one of the incorporated aids and thereby becomes subject to the requirements of the general apportionment act for receiving state aid. Therefore districts that fail to levy the required tax cannot be paid the transportation aid.

"Section 165.257, the law which requires certain school districts to pay tuition for pupils who attend a high school maintained by a state

Honorable Hubert Wheeler

institution of higher learning is still in effect. Also the new transportation act contains the substance of the repealed act by authorizing that transportation aid be paid to districts for transporting nonresident pupils admitted to their high school. Therefore the receiving high school district may charge a tuition and transportation cost fee as provided in these acts. Likewise, the same provisions would apply to state institutions of higher learning.

"Since an official opinion was issued on this matter in the construction of the 1931 School Laws, a review of the former opinion and construction should be given in the light of the new laws. A copy of the January 6, 1937 opinion is attached for your reference.

"I shall appreciate your advice and official opinion in answer to the following questions:

"1. Are state institutions of higher learning to be considered as school districts and thereby eligible to receive state aid under Senate Bill No. 3 and House Bill No. 182, Laws of 1955?

"2. Since Section 2 of Senate Bill No. 3 provides that a school district shall receive state aid for its educational program only if it meets certain requirements, one of which is that a \$1.00 tax rate for school purposes shall be levied; would such mandatory requirement prevent state educational institutions from being eligible for the state school money apportionment?"

We have quoted your request in full because it contains a complete summary of the statutes applicable to the questions submitted. The statutes referred to provide for state aid to "school districts" which must meet certain requirements before they are eligible for state aid. It is impossible for elementary schools and high schools operated in conjunction with institutions of higher learning to meet the requirements set out in Section 161.025(3), i.e., the levy of a property tax of not less than one dollar for current school purposes on each \$100 assessed valuation of the district.

Honorable Hubert Wheeler

It has been held on numerous occasions by the courts of this state that school districts are creatures of the Legislature. For example, see School Dist. of Oakland v. School Dist. of Joplin, 340 Mo. 779, 102 SW2d 909, and cases cited therein; Kansas City v. School Dist. of Kansas City, 356 Mo. 364, 201 SW2d 930.

The proposition is succinctly stated in 56 C.J., Schools and School Districts, page 193, Section 46:

"Only such school districts exist as are created or provided for by statute."

The opinion of January 6, 1937, directed to Honorable Lloyd W. King, to which you refer in your request, is hereby withdrawn.

CONCLUSION

It is, therefore, the opinion of this office that institutions of higher learning are not to be considered as school districts and are not eligible to receive state aid under Senate Bill No. 3, 68th General Assembly (Secs. 161.021-161.061, RSMo, Cum. Supp. 1955), or under House Bill No. 182, 68th General Assembly (Sec. 165.143, RSMo, Cum. Supp. 1955).

It is the further opinion of this office that the mandatory requirement in Section 2 of Senate Bill No. 3 (Sec. 161.025(3), RSMo, Cum. Supp. 1955), i.e., that a school district must levy not less than a one dollar tax rate for school purposes, would also prevent state institutions of higher learning from being eligible for the state school money apportionment.

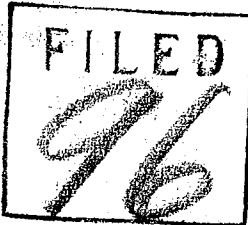
The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml

SCHOOLS: When because of extension of city limits boundaries of city school district are extended, respective
SCHOOL DISTRICTS: boards of education may adjust and apportion property and liabilities of districts prior to July 1.
ELECTIONS: Qualified voters in area so annexed to city district may vote in city district at April election following decree or vote extending city limits.



March 22, 1956

Mr. Hubert Wheeler
Commissioner
Department of Education
Jefferson Building
Jefferson City, Missouri

Dear Sir:

This is in response to your request for opinion dated March 5, 1956, which reads, in part, as follows:

"I shall appreciate your advice and official opinion in answer to the following questions:

1. Are school district boundary lines which are affected by the extension of city limits changed at the same time as the decree or vote effecting such change of city limits and can boards of education now properly transact the business of apportionment of property and obligations and any new business relating to the new school year?

2. If for all intents and purposes the school district boundary lines are changed at the same time as the extension of the city limits would it be proper for the school patrons of affected area to vote in the receiving districts at the annual April school election in the transaction of new business?"

This problem arises out of the provisions of Section 165.263, RSMo 1949, regarding the organization of a town or city school district, and particularly that portion thereof which reads as follows:

Mr. Hubert Wheeler

" * * * and every extension that has heretofore been made, or that hereafter may be made, of the limits of any city, town or village that is now or may be hereafter organized under the laws of this state, shall have the effect to extend the limits of such town or city school district to the same extent, and such extension of the limits of any city or town school district shall take effect on the first day of July next following the extension of the limits of such city, town or village, * * *"

In construing a statute, the primary objective is to determine the intention of the Legislature in enacting it into law. In arriving at this determination it is proper and often essential to consider all statutes relating to the same subject matter, i.e., those in pari materia. That principle was enunciated thus in State ex rel. Brokaw v. Board of Education of City of St. Louis, Mo. App., 171 SW2d 75, 79:

" * * * The purpose and object of the interpretation of any statute is to reach the true intent and meaning of the lawmaking authority, - the General Assembly. It is a cardinal principle of interpretation that statutes in pari materia are to be treated as embodied in one section, and considered together in order to elucidate the legislative intent therein enacted, and this is true though they are found in different chapters of the revised statutes and under different headings. State ex rel. McGurdy v. Slover, 126 Mo. 652, 659, 29 S.W. 718; State ex rel. Case v. Wilson, 151 Mo. App. 723, 132 S.W. 625. * * *"

Among the sections in the same chapter and relating to the same subject matter is Section 165.014, RSMo, Cum. Supp. 1955, enacted by the 68th General Assembly. That section makes provision for the adjustment and apportionment of school property between the districts involved when the limits of a city or town school district are extended by virtue of extension of the corporate limits of the city or town. It then provides that: "Such adjustment and apportionment shall be made as of the date of the decree or * * * of the vote of the electors effecting such * * * change of boundaries * * *" (Emphasis ours.) It further provides

Mr. Hubert Wheeler

that: "Such adjustment and apportionment of property and liability shall be made by the boards of school directors of the several districts concerned, before or during the first school year after such boundaries have been changed." (Emphasis ours.)

From this section we believe it clear that the boards of education can now properly transact the business of apportionment of property and obligations and that it is not necessary that they wait until after July 1 in order to perform this duty. This partially answers your first question and is helpful in arriving at the determination of the whole question.

3185.290
1949
Jus 1955-626

We are further aided by the case of State ex rel. Fleener v. Consolidated School Dist. No. 1, Mo. App., 238 SW 819, wherein the effect of Section 11262, RSMo 1919 (Sec. 165.290, RSMo 1949), was being considered. That section provided that when a consolidated district was organized, the original districts should continue until June 30 following the organization of such consolidated district. It was argued in the Fleener case that this being so, the consolidated district did not come into existence until July 1 following, so that a tax levy voted by the consolidated district at the April election in 1921 was void and of no effect. The precise question considered by the court was whether the consolidated district could function prior to June 30, 1921, or whether it was an entity without vitality from the date of its creation on October 22, 1920 until June 30, 1921, by reason of Section 11262, supra.

The court considered all the laws relating to consolidated districts and concluded that the consolidated district could function prior to June 30, 1921, at least insofar as was necessary in order for it to prepare for the coming school year. It held that the old districts continued to exist until June 30, which, incidentally, is the close of the school year (Sec. 163.020, RSMo 1949), for the sole purpose of winding up the business of the current school year.

Section 165.263, RSMo 1949, under consideration now, in providing for the formation of new city or town school districts, also contains the proviso that the new district, as created, shall become effective on the following July 1. We believe that, in the formation of a new city or town school district, the courts would give the same interpretation to this provision relating to July 1 as was given to Section 165.290, supra, in the Fleener case with respect to consolidated districts. In other words, it would hold that, in spite of the July 1 date, the new district could function prior to that date in order to prepare for the coming school year,

Mr. Hubert Wheeler

that the old district or districts would continue until that time merely for the purpose of concluding the affairs of the old district for the current school year. As was said in the Fleener case: "Any other construction would result in utter confusion and irreparable injury."

Since the same effective date is referred to in the same section with relation to the change of boundaries because of the extension of the limits of the city or town, it is only reasonable to say that it has the same meaning and should receive the same application that it would with relation to the formation of a new district. Coupling Section 165.263, supra, in its entirety with the reasoning in the Fleener case and with the portions of Section 165.014 underscored supra, we believe it was the intention of the Legislature, in providing the effective date of July 1, that in the conduct of the schools the districts should continue as they are for the current year and in the transaction of the current year's business, but as far as preparation for the coming school year and the adjustment and apportionment of the property and obligations of the several districts, the change in boundaries should be considered in effect as of the date of the vote or decree extending the boundaries of the city or town.

What has been said above probably would suffice to answer your second question with regard to the right of those people in the affected areas to vote in the receiving districts at the annual April school election. However, the answer to that question both results from the determination of the basic problem and provides an aid in the construction of the statute which lies at its foundation.

Concerning the right of suffrage, the Supreme Court of Missouri said in *Bowers v. Smith*, 111 Mo. 45, 55:

"The suffrage is regarded with jealous solicitude by a free people, and should be so viewed by those intrusted with the mighty power of guarding and vindicating their sovereign rights. Such a construction of a law as would permit the disfranchisement of large bodies of voters, because of an error of a single official, should never be adopted where the language in question is fairly susceptible of any other. Wells v. Stanforth (1885), 16 Q. B. Div. 245.

"Or, as a very able judge once tersely said:
'All statutes tending to limit the citizen

Mr. Hubert Wheeler

in his exercise of this right [of suffrage] should be liberally construed in his favor.' Owens v. State ex rel. (1885), 64 Tex. 509.

"It is proper, and often necessary, to consider the effect and consequences of a proposed interpretation of a law to ascertain what is probably its true intent. State v. Hope (1889), 100 Mo. 361; 8 L.R.A. 608. * * *"

Being proper to do so, consider the result and consequences of placing a strict construction on Section 165.263, supra, depriving these persons of the right to vote in the city or town districts at the April election. If they could not vote in the city or town district, they certainly could vote in the old district to which they originally belonged. There they would be voting on issues in which they have no interest or concern, e.g., tax rates, bond issues, board members, etc., because they would not be in that district when the matters presented at the April election would become effective. On the other hand, they would be deprived of the right to express themselves on the questions which vitally affect them, i.e., on the affairs of the city or town district for the school year beginning July 1, 1956; they will be subject to the tax rate imposed in the city or town district in this April election; they will be obligated for any bond issues presented or approved at this or any subsequent election. We do not believe the Legislature intended to deprive these electors of the right to express themselves on these matters. Therefore, we believe a liberal construction of Section 165.263, supra, in favor of the right of suffrage, dictates that the people in the affected areas should be permitted to vote in the city or town district at the April election.

CONCLUSION

It is the opinion of this office that when school district boundary lines are changed by virtue of the extension of the limits of any city or town under Section 165.263, RSMo 1949, the respective boards of education may proceed immediately to adjust and apportion the property and liabilities of the respective districts under Section 165.014, RSMo, Cum. Supp. 1955, and need not wait until the following July 1.

It is the further opinion of this office that the qualified electors in the area thus annexed may vote in such city or town

Mr. Hubert Wheeler

district at the April school election following the decree or vote so extending the limits of such city or town.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

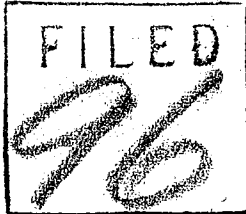
Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml

BOARDS OF EDUCATION:
SCHOOL DISTRICTS:
ANNEXATION OF DISTRICTS:
TRANSPORTATION OF SCHOOL CHILDREN:

Boards of education are authorized under Section 165.303, RSMo 1949, to transport pupils from territory annexed prior to, as well as subsequent to, the effective date of this section.



April 18, 1956

Honorable Hubert Wheeler, Commissioner
Department of Education
Jefferson Building
Jefferson City, Missouri

Dear Mr. Wheeler:

This will acknowledge receipt of your opinion request of March 30, 1956 in which you ask the following:

"Inquiry has come to this Department requesting information about the laws which relate to the transportation of pupils of annexed territory, and their application to school districts. Section 165.303, RSMo 1949 provides that whenever an entire district or a part of a district shall have been annexed to a town or city district, as provided in Section 165.300 the school board is authorized to provide transportation for the pupils of the annexed district or part of district. This law was enacted by the Sixty-fourth General Assembly and became effective on July 18, 1948.

"Many town or city school districts in this state have received or annexed other districts or parts of districts; some of such annexations took place prior to July 18, 1948 and many others subsequent to this date. Boards of education have in several districts where territory was received by annexation, found it necessary, and have provided transportation for the pupils, especially for the annexed areas received after the effective date of the law which authorized transportation. The question at issue in this inquiry is whether the school board has authority under this law to transport pupils from territory which was annexed prior to July 18, 1948 when there was no law authorizing school boards to transport pupils from such territory.

Honorable Hubert Wheeler, Commissioner

"The authority of the board of education to transport pupils from annexed districts or parts of districts also involves the laws which provide for the distribution of state transportation aid. Section 165.143 provides that any school district which makes provision for transporting its pupils as provided by law shall receive state aid. There is no question about the apportionment of state aid for the transportation of pupils from territory which has been annexed since the enactment of Section 165.303 July 18, 1948. However if boards of education should have the legal authority to transport pupils from territory which was annexed prior to the effective date of this act, the district would also qualify for state transportation aid.

"Transportation aid has never been paid by the State Department of Education to any district for the transportation of pupils from territory which was annexed prior to passage of Section 165.303. This Department has construed this act to apply only to annexations subsequent to the date it became law, July 18, 1948. The context of Section 165.303 indicates that it applies only to some event taking place in the future after the taking effect of the law. No provision is made in this act for school boards to transport pupils from territory annexed prior to the enactment of this law.

"The phrase 'shall have been' is future perfect tense, which represents an event as completed in future time, and does not refer to the past, therefore when used in the statutes it would indicate that which is to be done and perfected after the date of the enactment of the law. The provision of Section 165.303 which provides that '....whenever an entire district or part of a district shall have been annexed to a city or town district and authorizes the board to provide transportation' seems to contemplate an action to be perfected in the future subsequent to the date of the enactment of the law, July 18, 1948. Therefore it would appear that boards of education would have no authority to transport pupils from territory annexed prior to the enactment of this law. Also the district would not be entitled to receive state aid for such transportation.

Honorable Hubert Wheeler, Commissioner

"I shall appreciate your advice and official opinion in answer to the following questions:

1. Are boards of education authorized by Section 165.303 to transport pupils only from territory annexed subsequent to the enactment of this law which became effective July 18, 1948 or is this law general enough to extend the authority to transport pupils from territory annexed prior to the passage of this act?

2. Since state aid shall be paid under Section 165.143 to any school district which makes provision for transporting its pupils as provided by law, would the apportionment of such aid be limited or restricted to such transportation as has been legally authorized by law?"

Article I, Section 13 of the 1945 Constitution of Missouri prohibits laws which operate retrospectively. Said Section reads as follows:

"That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted."

It appears to this writer, however, that Section 165.303, RSMo 1949, does not operate retrospectively. Said Section reads as follows:

"Whenever an entire district or a part of a district shall have been annexed to a city, town or village school district, as provided in section 165.300, the school board of the city, town or village school district to which the district or part of district is annexed is hereby authorized to make necessary arrangements to transport the pupils of the annexed district or part of district to the school or schools designated by the board for said pupils to attend."

Honorable Hubert Wheeler, Commissioner

It is a well-settled rule of construction that constitutional and statutory provisions are to be construed as having a prospective operation only unless a different intent is evident beyond reasonable question (State ex rel. Scott v. Dirckx, 211 Mo. 568, 577, 111 SW 1). However, a statute is not retrospective merely because a part of the requisites for its action is drawn from a time antecedent to its passing (Endlich on Interpretation of Statutes, Sec. 280, p. 377; State ex rel. Ross to Use of Drainage Dist. No. 8 of Pemiscot County v. General American Life Ins. Co., 336 Mo. 829, 85 SW2d 68, 74).

The standard definition of a retrospective law is as set forth in Dye v. School Dist. No. 32 of Pulaski County, 355 Mo. 231, 195 SW2d 874, 879, where the court said:

"* * * A retrospective law is one that relates back to, and gives to a previous transaction, some different legal effect from that which it had under the law when it occurred. A statute is not retrospective merely because it relates to antecedent transactions, where it does not change their legal effect. * * *"

Quoting from Sedgwick on Statutory and Constitutional Law, the court said in State ex rel. v. General American Life Ins. Co., supra, SW2d 1.c. 73:

"'A statute which takes away any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in respect to transactions already past is to be deemed retrospective or retroactive.'"

As seen, retrospective means operative in the past. Section 165.303, supra, does not require transportation to be furnished prior to the effective date of the act. Such would be an impossibility in that an act to be done cannot be performed in the past. Consequently, the section does not operate retrospectively.

A law may apply to the past, however, without being retrospective. The statute in question (165.303, supra), applies to the past as well as to the future. It provides that whenever there shall have been an annexation, as provided in the preceding section, 165.300, RSMo 1949, transportation must be arranged. The construction to be given the words "shall have been" depends upon the legislative intent. The words were construed in the case of Gulf Refining Co. v. Evatt, 74 N.E. 2d 351, (Ohio) in which the court said at 1.c. 355:

Honorable Hubert Wheeler, Commissioner

"We are of the opinion that it was the design and purpose of this legislation to embrace any situation where it 'shall have been determined' that the property 'should not have been assessed as' realty or in which the property 'shall have been removed' from the realty duplicate. We are persuaded that if the General Assembly had intended the section to apply only to tax years after its enactment, it would have said 'shall be' instead of 'shall have been', just as, if it had intended the provisions of such section to apply only to tax years preceding its enactment, it would have said 'has been.' Therefore, the phrase 'shall have been' appears to have been designedly employed for the purpose of making the statute applicable to tax years preceding its enactment as well as to tax years subsequent thereto. * * *"

In the case of Clark et al. v. Kansas City, St. L. & C. R. Co., 118 S.W. 40, 219 Mo. 524, the court at l.c. 535 construed the same words as follows:

"Therefore, if the law says it is to operate only upon cases to be brought thereafter, if it in terms excludes pending cases, then we have nothing to do but to enforce it. Attending to that view, we do not read the statutes as contended by counsel for the respondent. Its use of the future form of the verb, 'commence,' as developed in the phrase 'shall have been commenced,' in correct usage in the discourse of good writers and speakers, includes the past as well as the future. That phraseology in a statute has been held by the Supreme Court of Connecticut to be 'susceptible of both past and future application; they (the words) furnish a convenient form for legislative use when it is desired to give all-inclusive force to a single expression. Therefore as they may mean future, or past and future, it becomes a question of legislative intent in each statute.' (Norris v. Sullivan, 47 Conn. 474). To the same effect is People ex rel. v. Board of Education, 110 N.Y. Supp. 769."

See also the case of Norris v. Sullivan, 47 Conn. 474, where the Supreme Court of Connecticut said:

Honorable Hubert Wheeler, Commissioner

"The words 'shall have levied' are susceptible of both past and future application. They furnish a convenient form of legislative use when it is desired to give all-inclusive force to a single expression. Therefore as they may mean future, or past and future, it becomes a question of legislative intent in each statute."

For a similar construction, see *People ex rel. Eckersen v. Town Board of Education, etc. of School District No. 10 Haverstraw*, 110 N.Y.S. 769, 126 App. Div. 414.

It appears to this writer that the legislature intended for the section (165.303, supra), to apply to the past as well as to the future-that "shall have been annexed" was intended to mean districts annexed under the annexation section (165.300, supra), and not to mean districts annexed subsequent to the effective date of this particular statute. A different construction would be in opposition to our concept of fairness and equality under the laws since it would, in effect, under Section 165.143 RSMo 1949, allow free transportation to children in districts annexed subsequent to the effective date of the statute while it would deny the same to the children in the districts annexed prior to the effective date of said statute.

Since it has been concluded that Section 165.303, supra, applies to the past as well as to the future, it does not seem necessary to answer the second question in the opinion request.

CONCLUSION

It is therefore the opinion of this office that boards of education are authorized under Section 165.303, RSMo 1949, to transport pupils from territory annexed prior to, as well as subsequent to, the effective date of this section.

Very truly yours,

JOHN M. DALTON
Attorney General

HLH/hw/bi

SCHOOLS :

SCHOOL DISTRICTS:

CONSTITUTIONAL LAW:

Children residing on federal lands comprising Fordland Air Force Station may attend school in school district within which such lands lie and attendance may be counted in apportioning state aid.

May 10, 1956



Mr. Hubert Wheeler
Commissioner of Education
Department of Education
Jefferson Building
Jefferson City, Missouri

Dear Sir:

This is in response to your request for opinion dated March 20, 1956, which reads as follows:

"During the last few years with the acquisition of property in this state by the Federal Government for Military purposes and on which is located housing areas the question arises whether the State of Missouri has the right, and if the right, the obligation to provide free public education to the children who live upon federal property where exclusive jurisdiction has been ceded to the United States Government. This question has been presented to your department on two other occasions; the one in reference to the Fort Leonard Wood Military Reservation in 1953; the other in reference to the Sedalia Air Force Base in 1955. The question at issue this time is whether the state, under its present laws, could legally provide educational facilities for children residing on the Fordland Air Force Station, located within the boundary of a common school district in Webster County.

"Information reported by Major Lawrence E. St. John, Commanding Officer of the Fordland Air Force Station and sent to this department on February 28, 1956, shows that the Federal

Mr. Hubert Wheeler

Government purchased last October 6, 1955, approximately 40 acres of land all located within a common school district of Webster County. Also adjacent additional territory was obtained on a lease basis. The housing area is located on the area owned by the Federal Government. There are nine houses on the Air Force Base from which there will be about nine children of school age. It is necessary at this time for some agency to arrange for educational facilities for these children.

"The Fordland Air Force Station is a restricted area used for military purposes the same as Fort Leonard Wood and the Sedalia Air Force Base. It does not seem possible to apply the laws of this state governing public schools to territory restricted by the Federal Government for military purposes. Such state laws relate to the freedom of petitioning for meetings, holding elections, securing school sites and building property, and establishing rules and regulations for operating a free public school.

"The laws of this state authorize the acquisition of land by the United States Government for such purposes as arsenals, forts, and other military purposes. Section 12.030 gives consent to the United States to acquire land by purchase or condemnation for military purposes. Section 12.040 gives exclusive jurisdiction to the United States over land used for military purposes, reserving only the right of taxation and the right to serve processes. Both Sections 12.030 and 12.040 were repealed and reenacted by H. B. 371, Sections 1 and 2, laws of 1955. The reenacted laws are identical with the sections having the same number in RSMo 1949. These two laws are general in reference to consent in acquiring land and granting exclusive jurisdiction. When any land area is taken over for military purposes and the state cedes exclusive jurisdiction to the United States, there is no authority or power remaining for the state to provide educational facilities. Military

Mr. Hubert Wheeler

reservations such as Fort Leonard Wood, the Sedalia Air Base and the Fordland Air Force Station seem to require exclusive jurisdiction on the part of the Federal Authority in order to attain the Federal purpose.

"In your opinions of January 26, 1953 in relation to Fort Leonard Wood Military Reservation and May 23, 1955 in relation to the Sedalia Air Force Base, it was ruled that the State Board of Education cannot legally apportion state school moneys to any school district in order to provide educational facilities for pupils residing on such restricted military reservations. A copy of each of these opinions are attached for your reference.

"In the light of the foregoing facts, and the opinions rendered in relation to other military reservations, I shall appreciate your advice and official opinion in answer to the following questions:

(1) Are there any state laws which would allow the Fordland Air Force Station to be considered as part of the common school district which surrounds it, thereby making it legal for the State Board of Education to apportion school money by counting attendance of the pupils living on the Air Force Station for the apportionment of school moneys to the district?

(2) Or is the Fordland Air Force Station to be considered as independent from the common school district so that the laws governing school districts of this state do not apply to lands owned by the United States Government to which exclusive jurisdiction has been ceded?"

In your request you have referred to two prior opinions of this office holding, with regard to the Sedalia Air Force Base and the Fort Leonard Wood Military Reservation, respectively, that the State Board of Education could not legally apportion state school moneys to a school district in order to provide educational facilities for pupils residing in those areas and that such military

Mr. Hubert Wheeler

reservations could not be organized as school districts within the state or become annexed to an adjoining school district. Those opinions were based primarily upon the fact that exclusive jurisdiction had been ceded to the federal government, with the result that for purposes of providing free education such areas were not in the state of Missouri and subject to its laws.

It is pointed out in *Arledge v. Mabry*, 52 N.M. 303, 197 P2d 884, that there are three principal methods by which the United States may acquire land within a state: First, the constitutional method as provided by Clause 17, Section 8, Article I of the Federal Constitution; second, by purchase without obtaining the consent of the state; third, where the land acquired by the government was the property of the state, such acquisition being by a cession by the state to the federal government in the nature of a gift. With respect to jurisdiction, different consequences follow acquisition under the three means permitted.

The Sedalia and Fort Leonard Wood reservations were acquired by the United States in the constitutional method, i.e., by consent of the Legislature. More explicitly stated, the United States Constitution, Article I, Section 8, Clause 17, gives Congress power, among other things:

"To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings."

From time to time the Legislature has given its consent to such acquisitions by the federal government by the re-enactment of the following law (Secs. 12.030 and 12.040, RSMo, Cum. Supp. 1955):

Sec. 12.030.

"The consent of the state of Missouri is hereby given, in accordance with the seventeenth clause, eighth section, of the first article of the Constitution of the United States, to the acquisition by the United

Mr. Hubert Wheeler

States by purchase, condemnation, or otherwise, of any land in this state which has been acquired, prior to the effective date of sections 12.030 and 12.040, as sites for customhouses, courthouses, post offices, arsenals, forts, and other needful buildings required for military purposes."

Sec. 12.040.

"Exclusive jurisdiction in and over any land so acquired, prior to the effective date of sections 12.030 and 12.040, by the United States shall be, and the same is hereby, ceded to the United States for all purposes, saving and reserving, however, to the state of Missouri the right of taxation to the same extent and in the same manner as if this cession had not been made; and further saving and reserving to the state of Missouri the right to serve thereon any civil or criminal process issued under the authority of the state, in any action on account of rights acquired, obligations incurred, or crimes committed in said state, outside the boundaries of such land but the jurisdiction so ceded to the United States shall continue no longer than the said United States shall own such lands and use the same for the purposes for which they were acquired."

We call your attention particularly to the fact that the cession of exclusive jurisdiction by the State of Missouri to the federal government is only with respect to lands acquired by the federal government prior to the effective date of the act. As to such lands, e.g., the Sedalia Air Force Base and the Fort Leonard Wood Military Reservation, exclusive jurisdiction having been ceded to the federal government and with certain minor exceptions removed from the jurisdiction of the State of Missouri, it has consistently and properly been held that for school district purposes such areas are not within the state of Missouri.

However, the last re-enactment of the above Sections 12.030 and 12.040 was in the 68th General Assembly, effective August 29, 1955, and you have informed us that the Fordland Air Force Station in Webster County was acquired by the federal government by purchase on October 6, 1955. Hence, the State of Missouri has not ceded exclusive jurisdiction over this land to the United States.

Mr. Hubert Wheeler

An excellent discussion of this whole problem is found in *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 536, 5 S. Ct. Rep. 995. Having discussed the question of jurisdiction where lands have been acquired by the United States in the constitutional manner, and incidentally citing with approval an opinion of the Justices of the Supreme Judicial Court of Massachusetts which held that when land is so acquired by the federal government persons residing thereon are not entitled to the benefits of the common schools of the state (U.S. 1.c. 536), the court went on to say at U.S. 1.c. 538:

"But with reference to lands owned by the United States, acquired by purchase without the consent of the State, or by cessions from other governments, the case is different. Story, in his *Commentaries on the Constitution*, says: 'If there has been no cession by the State of the place, although it has been constantly occupied and used under purchase, or otherwise, by the United States for a fort or arsenal, or other constitutional purpose, the State jurisdiction still remains complete and perfect;' and in support of this statement he refers to *People v. Godfrey*, 17 Johns. 225. * * *

"Where, therefore, lands are acquired in any other way by the United States within the limits of a State than by purchase with her consent, they will hold the lands subject to this qualification: that if upon them forts, arsenals, or other public buildings are erected for the uses of the general government, such buildings, with their appurtenances, as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed. Such is the law with reference to all instrumentalities created by the general government. Their exemption from State control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers. But, when not used as such instrumentalities, the legislative power of the State over the places acquired will be as full and complete as over any other places within her limits."

Mr. Hubert Wheeler

Consequently, the land comprising the Fordland Air Force Station remains within the state of Missouri and, as a general proposition, subject to its jurisdiction. One exception to that general statement is, of course, that the land cannot now be taxed by the state (Const. of Mo. 1945, Art. III, Sec. 43; Art. I, Sec. 8, Clause 17, Const. of U.S.). Another is that, as pointed out in the above quotation, the state cannot exercise its jurisdiction so as to interfere with, destroy or impair the effective use of the lands for the purpose for which they were acquired by the federal government.

Therefore, since, with those exceptions, the land comprising the Fordland Air Force Station remains within the jurisdiction of the State of Missouri, subject to its laws, it is in law still within the state of Missouri, still part of the common school district of Webster County within the boundaries of which it is located, and the children of school age residing thereon may be counted for attendance purposes in apportioning state school moneys to such school district.

CONCLUSION

It is the opinion of this office that since the State of Missouri has not ceded exclusive jurisdiction over the lands comprising the Fordland Air Force Station in Webster County, Missouri, to the United States, children residing thereon may attend school in the common school district within the boundaries of which such lands lie and their attendance may be counted in the apportionment of state school moneys for such district.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml

AUTHORITY OF COUNTY
BOARD OF EDUCATION:
AUTHORITY OF STATE
BOARD OF EDUCATION:
REORGANIZATION PLANS:

(1) A county board of education may withdraw a proposed plan of reorganization prior to the time the state board of education has acted thereon. (2) The State Board of Education is authorized to comply with a request of the County Board of Education to withdraw a proposed plan of reorganization.



June 1, 1956

Honorable Hubert Wheeler
Commissioner of Education
Jefferson City, Missouri

Dear Mr. Wheeler:

This will acknowledge receipt of your opinion request of May 10, 1956, in which you ask the following:

"The County Board of Education of Atchison County has requested from the State Board of Education the privilege of withdrawing a proposed county plan for the reorganization of school districts in that county. This request was received just prior to the time when the State Board of Education was to give consideration to the proposed plan. This has raised the question as to the right of the County Board of Education to recall a plan after it has once been filed with the State Board of Education, or even the authority of the State Board to permit a county board to recall a plan for further study and revision.

"The following facts are submitted for your information in giving consideration to this request.

"The Atchison County Board of Education submitted a revised fourth plan of district reorganization dated March 30, 1956 which was filed with the State Department of Education on April 4, 1956. On April 25, 1956 the Atchison County Board adopted a motion to recall the revised fourth plan on file with the State Board of Education and instructed the secretary of the county board to submit a request to the State Board of Education. A copy of the letter directed to Hubert Wheeler, Commissioner of Education, and dated May 1, 1956, which contained the request recalling the revised fourth plan was as follows:

Honorable Hubert Wheeler

"At a legally called meeting of the County Board of Education of Atchison County, Missouri, on the date of April 25, 1956, held at 8:00 p.m., the motion was made by Mr. H. Charles Cox that the revised plan, dated March 30, 1956, be recalled for further study and revision. The motion was seconded by Mr. William Beckman and carried.

"Voting for the motion were: H. Charles Cox, William Beckman, Cecil Van Meter, Jr., Willis Barnhart, Charles Zuck, and Henry Bowness. Voting against the motion, none.

"The Secretary of the Board was instructed to mail a copy of this resolution requesting the recall of this plan to the State Board of Education for their consideration."

"This request was signed by Henry Bowness, President of the County Board; S.W. Skelton, Secretary of the County Board; and notarized by Harry Emrich, May 1, 1956.

"This statement of request recalling the plan was received by the State Board of Education on May 2, 1956. The State Board of Education, in an official session May 4, 1956, had before it for consideration the Atchison County revised fourth plan and also the County Board's request recalling the revised fourth plan. The State Board delayed action on this revised fourth plan pending a legal decision on the matter of withdrawing plans.

"Section 165.673 is the basic law which authorizes a county board of education to make a study of the county's needs and propose plans of reorganization. Section 165.693 supplements the basic act by authorizing the county board to submit subsequent plans for reorganization of school districts. Section 165.677 (amended Laws of 1955, House Bill #60) sets out the procedure to be followed by the State Board of Education in approving or disapproving a county plan in whole or in part.

"I should be glad to have your advice and official opinion in answer to the following questions:

Honorable Hubert Wheeler

"(1) In the absence of any specific laws which would authorize the withdrawal of plans by a county board of education, are there any general laws or implied authority that would give the county board the legal right to withdraw county board plans for further study and revision if such request is made prior to the time the State Board acts upon such proposed plans?

"(2) If the county board of education should have the authority to withdraw submitted proposed plans for further consideration, would the State Board of Education have the legal authority to comply with such a request?"

As pointed out in the opinion request, Sections 165.673, RSMo 1949, 165.693, RSMo 1949, and 165.677, Cum. Supp. 1955, deal with the matter of procedure of both the county board of education and the state board of education in the process of reorganization of school districts. It appears that nowhere in the statutes has the Legislature defined the scope of authority of said boards in the performance of their duties under the above cited sections. Although there are no cases which have determined the authority of the boards of education under those sections, there are cases in which analogous problems have been determined.

In the case of State ex rel. Thorp vs. Phipps, 49 S.W. 865, 148 Mo. 31, taxes were levied against defendant's property pursuant to an annexation which defendant claimed to be invalid. One of defendant's contentions was that an estimate of the amount of tax money needed had been improperly withdrawn. A statute provided that the school "shall forward to the county clerk an estimate of the amount of funds necessary to sustain the schools of their district for the time required by law, or, when a longer term has been ordered by the annual meeting, for the time thus decided upon, together with such other amount for purchasing site, erecting buildings, or meeting bonded indebtedness and interest on same, as may have been legally ordered in such estimate, stating clearly the amount deemed necessary for each fund, and the rate required to raise said amount." The Supreme Court of Missouri said at l.c. 36 of the official report:

"(2) On the trial the defendant introduced evidence tending to prove that in pursuance of the election, another and different estimate from the one in question was made and forwarded to the clerk, in which the apportionment was

Honorable Hubert Wheeler

different from that suggested in the notice of the election and from that adopted in this estimate. But as that estimate was withdrawn and never acted upon, and the estimate in question substituted therefor and was the one upon which the levy was made, we do not see how the validity of this tax can be in any way affected by the fact that such an estimate was made, or by any defects thereof."

In the case of Pope vs. Lockhart, 252 S.W. 375, 299 Mo. 141, under a statute like or similar to the one involved in the Thorp case, supra, one of the deputies of the county clerk changed or mutilated the estimate levy. The majority of the school board learned of this change in the certificate of the estimate, withdrew the altered estimate and framed a second certificate like the first that had been authorized. On the question of the authority of the board to make the withdrawal, the Supreme Court of Missouri said at l.c. 146 of the official report:

"The statute (Sec. 11142, R.S. 1919) makes it the duty of the school board to make the estimate of the funds necessary to sustain the school in its district and state the amount and the rate required to raise it. Section 11183, Revised Statutes, 1919, makes it the duty of the county clerk 'on receipt of the estimates to assess the amount so returned on all taxable property, . . . except he shall not exceed stated limits which do not affect the question in this case. The withdrawal and correction of the mutilated estimate was lawful. [State ex rel. v. Phipps, 148 Mo. 1.c. 36, 37.] It is clear that the Legislature committed to the school board the duty to make the estimates for the year, and that the board kept its estimate well within the lawful limits of the levy constitutionality authorized by the voters. The courts are not expressly given authority to revise the estimates of the board, and will not arrogate to themselves such power merely because it may be thought the levy recommended will raise a sum in excess of the needs of the fund for which the levy is made, nor yet because there may be some evidence tending to show an intent to divert the money, after its collection, to another purpose, since this can be dealt with when such attempt at diversion is made. [c.,

Honorable Hubert Wheeler

C.C. & St. L. Ry. Co. v. People, 208 Ill. l.c. 11, 12, and cases cited; 1 High on Injunctions (4 Ed.) Sec. 544, pp. 517, 518, 519.] The power given the board is 'highly discretionary' and legislative in nature."

See also the case of West et al. vs. Tolland, 25 Conn. 133, where the court determined the question of the authority of certain petitioners to withdraw their petition. Said petition was one for the construction of a highway. In holding that the petitioners did have such authority, the Supreme Court said at l.c. 136 of the official report:

"ELLSWORTH, J. The single question presented in this case is, whether the plaintiffs had a right to withdraw their petition, after a verbal communication by the county commissioners, that they were of the opinion, and so decided, that the highway prayed for was not of public convenience and necessity. We think they had. The case was still undecided by the commissioners, in the eye of the law, and it remained so until the commissioners had drawn up and signed the report and presented it to the court, or the clerk of the court, to which it is returnable, or at least to the parties or their counsel; until this was done, they could not be said to have put their decision into legal form, or to have divested themselves of power to deliberate further, and change their opinion if they saw fit, upon giving notice to the parties. Somewhere there must be a point, to distinguish between mere opinion or purpose, and a fixed and unalterable judgment. Where is this point, in the doings of commissioners, whose report becomes a part of the records of the court? We think their report alone can speak their official acts, and therefore to that only can we look to know what those acts are. We are satisfied that nothing short of this will answer the requisites of the law, and that until they have finished and signed the report, they have not divested themselves of power to act in the premises, as they may have occasion. The same is true of auditors, committees in chancery and jurors. In the case of the latter, it has often been ruled on the circuit, that the plaintiff may suffer a nonsuit at any time before the verdict is placed in the hands of the clerk. Up to that moment any juror may withdraw his assent to the verdict, and the panel may destroy it or modify it as they please."

Honorable Hubert Wheeler

Closely related to the question of withdrawal of a petition and also analogous to the issue with which we are concerned is the matter of withdrawal of signatures from a petition for the creation or alteration of a school district. It is generally held in such situations that a signature may be withdrawn from the petition prior to the time that action has been taken thereon. See the following language in 78 C.J.S., Schools and School Districts, Section 37(3), page 706-707:

"A signatory of a petition for the creation or alteration of a school district may have his signature withdrawn or erased therefrom before the petition is filed or the jurisdiction of the officer or board to whom the petition is directed has attached, but according to some authorities a signatory may not as a matter of right withdraw his signature thereafter, although withdrawal may be allowed where good cause is shown. However, other authorities hold that in the absence of statute providing otherwise, a signatory may withdraw his signature from the petition as a matter of right at any time before final action on the petition. In any event, a signatory has no right to withdraw his signature after action on the petition has been taken except where the attempted action is entirely unauthorized and void, although if he was induced to sign by misrepresentations he may apply for leave to withdraw his signature. Applications to withdraw signatures may and should be considered in passing on the petition, where discretion to grant or refuse it is vested in the officer or board to which it is presented."

From the above cases and authority, it appears to this writer that a county board of education may withdraw a plan of reorganization before it has been acted upon by the state board of education. Further, there is no indication in the above quoted sections of the statutes that such a plan may not be withdrawn for further study and revision. To hold otherwise might well subject a plan approved by the state board of education to the voters under Section 165.680, Cum. Supp. 1955, which plan would not be the most suitable and desirable one in the interest of the school districts concerned.

As to the authority of the state board of education to comply with the request to withdraw, the authority of the county board of education to make the withdrawal necessarily implies the authority of the state board of education to comply therewith. There would

Honorable Hubert Wheeler

be no authority in the state board of education to comply with the request to withdraw if the county board of education was without authority to make the withdrawal, but it having been decided that the county board of education has the authority to withdraw the plan of reorganization prior to the time that the state board of education has acted upon the proposed plan, it follows that the state board has the authority to comply with said request.

CONCLUSION

It is therefore the opinion of this office that:

(1) A county board of education may withdraw a proposed plan of reorganization prior to the time upon which the state board of education has acted thereon.

(2) The state board of education is authorized to comply with a request of the county board of education to withdraw a proposed plan of reorganization.

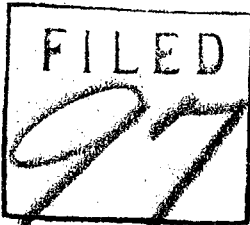
The foregoing opinion, which I hereby approve, was prepared by my assistant, Harold L. Henry.

Yours very truly,

JOHN M. DALTON
Attorney General

HLH/b1

TAXATION:
TAX SALES:
COUNTY COLLECTOR:



A publication of notice requisite to the sale of lands for taxes directed merely to the "heirs of" a certain person is insufficient and would render a sale based thereon invalid even though that was the method by which the owner was actually listed on the land tax book. In the event the proceeds arising as a result of an invalid sale are refunded to the purchaser out of the county general revenue fund the proceeds of a subsequent valid sale should be paid over to general revenue.

June 4, 1956

Honorable Robert E. Wilson
Prosecuting Attorney
Polk County
Bolivar, Missouri

Dear Sir:

At an earlier date you requested an opinion as to the validity of a tax sale where the published notice was directed merely to "A's heirs." Under date of December 5, 1955, this office issued an official opinion holding that a notice of sale of land for delinquent taxes, directed merely to the "heirs of" a certain person, is insufficient and would render a sale based thereon invalid. Due to a lack of information it was assumed for the purpose of that opinion that the phrase "A's heirs" was not the manner in which the assessment was carried on the land tax book. We are now advised that the assessment, or assessments, in question were actually carried on the land tax book in the name of "A's heirs" and you ask a reconsideration of said opinion in light of this fact.

As noted in the previous opinion, Section 13 of Article X of the Constitution of 1945, and Section 140.150, RSMo 1949, provide that no real property shall be sold for taxes without judicial proceedings unless the notice of sale shall contain the names of all record owners or the names of all owners appearing on the land tax book. It was further noted that prior to the 1945 Constitution, there was no requirement that the notice of sale of real property for delinquent taxes in a nonjudicial proceeding contain the names of the record owners or the names of the owners appearing on the land tax book and, in fact, such requirement was negated by the terms of the then existing statute.

In view of the holding of the December 5, 1955, opinion, the question now remains as to whether a notice of sale directed to "A's heirs" is in compliance with the requirement that the notice shall contain, in lieu of the names of all record owners, the names of all owners appearing on the land tax book. What then

Honorable Robert E. Wilson

is the requirement as to names of owners appearing on the land tax book?

Section 137.215, RSMo 1949, provides that the land tax book shall contain the "owner's name, if known, and if not, then the name of the original patentee, grantee, or purchaser from the federal government, the state or county, as the case may be."

Section 137.225, RSMo 1949, provides that the first column of the real estate book "shall contain the name of the owner, or owners, if known; if not, the names of the party who paid the last tax; if no tax has ever been paid then the name of the original patentee, grantee or purchaser from the federal government, the state or county, as the case may be."

Speaking in regard to the above-noted two statutory provisions, the Supreme Court in the case of State vs. Clements, 219 S.W. 900, l.c. 901, said:

"Read and construed together, the three sections seem to mean that land shall be assessed in the name of the owner, if known, if not, in the name of the party who paid the last tax, if no tax has ever been paid, then in the name of the original patentee, etc.; * * * *"

While we do not find any judicial interpretation of the word "name," as used in relation to the land tax book, the Supreme Court had occasion to interpret said word as used in a like manner in relation to the personal assessment book. The court in the case of State vs. Corneli, 149 S.W. 2d. 815, held that the word should be taken in its plain, ordinary and usual sense and that a person's name is the designation ordinarily used and by which he or she is known in the community. More specifically, the court said at l.c. 821:

"* * * * But what does the word 'name' mean? We think the word 'name' as used in the statutes with reference to the assessment of personal property, should be taken in its plain, ordinary and usual sense. Sec. 655, R.S. 1929, Mo. St. Ann. Sec. 655, p. 4899. A person's name is the designation ordinarily used, and by which he or she is known in the community. Names are used as a method of identification. * * * *"

We perceive of no reason why a like definition should not obtain to said word as used in relation to the land tax book.

Honorable Robert E. Wilson

As was pointed out in the opinion of December 5, 1955, statutory provisions relating to the sale of land for delinquent taxes are to be construed most strictly in favor of the owner of said land and a proper notice of sale is one of the most important of all safeguards that have been deemed necessary to protect the interests of persons taxed, and nothing can be substituted for it, or excuse the failure to give it. This rule takes on added importance when it is borne in mind that prior to 1945, the statutory authority for the sale of land for delinquent taxes in a nonjudicial proceeding specifically stated that the name of the owner need not be included in the notice of sale and that thereafter the framers of the 1945 Constitution saw fit to require the notice of sale to contain the names of all record owners, or the names of all owners appearing on the land tax book.

The term "A's heirs" is not within the definition of the word "name" as above noted. Nor do we find any statutory authority for the entry of a term such as "A's heirs" on the land tax book in lieu of the "name" of the owner, the party who last paid the tax, or the original patentee, grantee, or purchaser from the federal government, state or county, as the case may be.

We understand Section 13 of Article X of the Missouri Constitution and Section 140.150, RSMo 1949, to mean the "names" of all owners appearing on the land tax book which are properly entered therein under direction and authority of law. It is apparent from the foregoing that in the instant case no proper entry has been made in the land tax book and, therefore, such entry as was made cannot, in our opinion, be made the basis of a valid sale in a nonjudicial proceeding.

You further inquire in the event the sale is invalid and the purchase money is refunded to the purchaser from the county general revenue fund and the land is again sold, whether the collector should pay the proceeds of the second sale to the county general revenue fund or distribute the tax proceeds from such second sale to the various school districts, road districts, and other taxing authorities.

Your attention is invited to Section 139.210 RSMo 1949, which provides, in part, as follows:

"1. Every county collector and ex officio county collector, except in the city of St. Louis, shall, on or before the fifth day of each month, file with the county clerk a detailed statement, verified by affidavit, of all state, county, school, road and municipal taxes, and of all licenses by him collected during the preceding month, and shall, on

Honorable Robert E. Wilson

or before fifteenth day of the month, pay the same, less his commissions, into the county treasuries and to the director of revenue."

Said section provides that on or before the 15th day of each month the county collector shall pay all collections into the county treasury or to the Director of Revenue, as the case may be. In view of the provisions of this section we are of the opinion that the proceeds of a valid second sale should be turned over to the county treasury.

CONCLUSION

Therefore, it is the opinion of this office that a publication of notice requisite to the sale of lands for taxes directed merely to the "heirs of" a certain person is insufficient and would render a sale based thereon invalid even though that was the method by which the owner was actually listed on the land tax book.

We are further of the opinion that in the event the proceeds arising as a result of an invalid sale are refunded to the purchaser out of the county general revenue fund the proceeds of a subsequent valid sale should be paid over to the county treasury.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Donal D. Guffey.

Yours very truly,

John M. Dalton
Attorney General

DDG:mw

MOTOR VEHICLES: Proposed information for violation of provisions of
CRIMINAL LAW: Section 304.010, MoRS 1949, sufficient to fully apprise
INFORMATIONS: the one charged of the offense committed.



June 7, 1956

Honorable Robert E. Wilson
Prosecuting Attorney
Bolivar, Missouri

Dear Mr. Wilson:

This will acknowledge receipt of your request for an opinion,
the pertinent part of which reads:

* * * * *

"I would like to have the opinion of your office on the sufficiency of an information charging the crime of careless and reckless driving in the following form, assuming that it contained all of the other necessary formal allegation: 'Did drive and operate a motor vehicle on, over, and along a public highway in said county and state in a careless, reckless and imprudent manner, by operating said vehicle at an excessive and unreasonably high rate of speed, so as to endanger the lives, limbs and property of persons of within said state and county, etc.'"

"I would like for you to consider this request particularly in the light of the language in the cases of the State vs. Ball, 171 Southwest second 787, and State vs. Reynolds, 274 Southwest second 514. Based on my own research, it seems to me that excessive speed in itself might be ground for a criminal charge of careless and reckless driving under certain circumstances even in the absence of a violation of any of the other rules of the road."

Section 304.010, MoRS 1949, requires that every person operating a motor vehicle on the highways of this state shall drive same in a careful and prudent manner and shall exercise the highest degree of care and at a rate of speed so as to not endanger the property of another or life or limb of any person. Said section reads:

Honorable Robert E. Wilson

"Every person operating a motor vehicle on the highways of this state shall drive the same in a careful and prudent manner, and shall exercise the highest degree of care, and at a rate of speed so as not to endanger the property of another or the life or limb of any person, provided that a rate of speed in excess of twenty-five miles an hour for a distance of one-half mile shall be considered as evidence, presumptive but not conclusive, of driving at a rate of speed which is not careful and prudent, but the burden of proof shall continue to be on the prosecution to show by competent evidence that at the time and place charged the operator was driving at a rate of speed which was not careful and prudent, considering the time of day, the amount of vehicular and pedestrian traffic, condition of the highway and the location with reference to intersecting highways, curves, residences or schools; provided, however, that no person shall operate a solid tire commercial motor vehicle having a rated live load capacity of two tons and less at a rate of speed exceeding twenty miles per hour, or a solid tire commercial motor vehicle having a rated live load capacity of more than two tons and not more than five tons at a rate of speed exceeding fifteen miles per hour, or a solid tire commercial motor vehicle having a rated live load capacity of more than five tons at a rate of speed exceeding ten miles per hour; and provided further, that no person shall operate a motor vehicle equipped with iron or other metal tires at a greater rate of speed than six miles per hour."

Section 304.570, MoRS 1949, further provides that any person violating any provisions of said chapter for which there is no specific punishment provided, upon conviction thereof, shall be punished by a fine of not less than \$5.00, nor more than \$500.00, or by imprisonment in the county jail for a term not exceeding two years, or by both such fine and imprisonment.

There being no specific punishment provided by statute for the violation of Section 304.010, supra, we are inclined to hold that Section 304.570, supra, is applicable, fixing the penalty upon conviction for violating any provision of said chapter (304) when there is no specific punishment provided therefor.

Honorable Robert E. Wilson

In State v. Ball, 171 S.W.(2d) 787, l.c. 792 and 793, the defendant was charged with operating a motor vehicle over the highways in a careless and reckless manner by violating one of the rules of the road in not keeping his motor vehicle as near to the right side of the highway as possible, etc. (see l.c. 789).

The defendant contended on appeal that said section 8383, under which the information was drawn similar to Section 304.010, supra, was not a penal statute but merely set out certain rules of the road which the operator should follow and upon failing to so follow he could only be guilty of negligence. The court in holding to the contrary, said, at l.c. 792 and 793:

"[13] Such charges of 'careless' and 'imprudent' operation of his car on the part of defendant, coupled with the allegation of the facts as to the manner of such careless and imprudent operation, charged conduct which was obviously contrary to and in violation of the statute, Section 8383, supra, and it constitutes a penal offense when considered in connection with the allegations of violation of Section 8385(b), supra. Punishment for said unlawful conduct is not provided for elsewhere in the laws governing motor vehicles, and, therefore, it comes within Section 8404(d), supra, which provides for punishment for violation of 'any of the other provisions of this article,' meaning, of course, Article I, which contains the sections, supra, under which defendant herein was prosecuted.

* * * * *

"If we should adopt the view contended for by the defendant herein, drivers could with impunity operate motor vehicles on the highways at night without lights, and at all times without signal devices, thereby endangering the lives and property of others, as well as themselves, although driving without lights at night and driving without brakes are prohibited by Sections 8386 and 8387, RSMo 1939, MoRSA §§ 8386 and 8387. To put it mildly, we believe the Legislature did not intend any such result."

In State vs. Reynolds, 274 S.W.(2d) 514, the information therein was criticized as to the sufficiency of the information in that the

Honorable Robert E. Wilson

court failed to charge an offense. The defendant appealed from said conviction. Said information reads as follows at l.c. 514:

"The information charged: 'Douglas W. Greene, Prosecuting Attorney within and for the County of Greene, in the State of Missouri, informs the court that Clarence Edwards Reynolds, on the 24th day of February, A.D., 1953, at the said County of Greene, did then and there willfully, unlawfully drive and operate a motor vehicle, to-wit: a 1950 Buick Coach on the public highway of Greene County, Missouri, in a careless, reckless and imprudent manner so as to endanger the life, limb and property of others contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Missouri.'"

The court in passing upon the sufficiency of the information had this to say at l.c. 516:

"* * * * If the information had said that defendant operated his car in a careless and imprudent manner in that he was driving at a high rate of speed or was operating it on the wrong side of the road or that he was failing to keep it as near the right-hand side of the road as practicable or any of the other requirements of the statute, and by so doing, he endangered the property of another or the life or limb of any person, the information would have charged an offense under the law. As the information stands it merely pleads conclusions of law."

We believe that the information proposed by you in your request sufficient, as it appears to meet the requirements of the court set out in State v. Reynolds, supra, which were lacking in the information in that case. We can see no difference in violating a rule of the road as provided now in Sections 304.014 and 304.015, MoRS Cum. Supp. 1955, formerly Section 304.020, MoRS 1949, than violating the provision of Section 304.010, MoRS 1949. Both require persons operating motor vehicles over the highway shall drive in a certain manner and neither provides specifically for punishment for failure to so comply with the statute. However, in both instances there is a general punishment statute applicable to violations for which no punishment is provided by statute.

Honorable Robert E. Wilson

Furthermore, it might be considered good practice if you add immediately following, the words "unreasonably high rate of speed," words expressing the hazardous condition of the highway, such as the example referred to in your request, that the operator was driving over a road covered with ice, or mention the congested traffic at that particular time of day, or approaching a curve, etc.

We do not herein hold that the foregoing additions to the proposed information are absolutely essential to the validity of said proposed information but only that it will strengthen the validity of said information. The allegations in said proposed information clearly state in what manner or way the provisions of Section 304.010, supra, were violated. It contains a plain and concise statement of facts constituting the offense as provided by Supreme Court Rule 24. See State vs. Reynolds, supra.

CONCLUSION

Therefore, it is the opinion of this department that the proposed information contained in your request is sufficient to fully apprise the one charged of the offense committed, in violation of the provisions of Section 304.010, MoRS 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

ARH:mw

John M. Dalton
Attorney General

MAGISTRATES:
MOTOR VEHICLES:
MOTOR VEHICLES OPERATORS'
LICENSES:

Driver's license may be suspended as habitual reckless or negligent driver for conviction of two charges of reckless and careless driving within two years, even though one conviction occurred prior to effective date of re-enacted statute.



November 9, 1956

Honorable Robert E. Wilson
Prosecuting Attorney, Polk County
Bolivar, Missouri

Dear Mr. Wilson:

You have requested an opinion of this office as follows:

"The Magistrate Court of this County recently suspended the driver's license of an individual for a period of one year under the following conditions. The man had previously been convicted in July of 1955 of a charge of careless and reckless driving. On June 2nd, 1956, he entered a plea of guilty to another charge of careless and reckless driving and the Magistrate made the suspension aforesaid of his license, and sent the license to the Department of Revenue in Jefferson City.

"The suspension was made pursuant to the provisions of Section 302.281(2) on the theory that the defendant was an habitual reckless or negligent driver of a motor vehicle. Section 302.010(7) defines an habitual reckless or negligent driver as one who has been convicted in any Circuit or Magistrate Court at least two times within two years of the charge of careless and reckless driving. Both of the above quoted sections of the law became effective on August 29th, 1955.

"Today the Magistrate Court here received a letter from the Department of Revenue returning the license of this individual with the statement that they did not have authority to suspend the license. They gave as their reason for this 'a subject must have two careless and reckless driving charges after August 29th, 1955, the date said law became effective.' I would

Honorable Robert E. Wilson

like to have the opinion of your office as to whether the position of the Department of Revenue is correct or whether we do have the authority to suspend this license under the sections quoted above. It seems to me that this is a situation similar to proceedings under the Habitual Criminal Act, and that the suspension of the license according to the laws aforesaid would not amount to an ex post facto conviction."

Under the provision of Section 302.281, RSMo Cum. Supp. 1955, and in accordance with an opinion to Honorable Harold W. Barrick, dated August 19, 1955, it is thought that the magistrate you speak of in your request letter was fully justified in the suspension of a second offender when he had the record either before him or found the previous record of suspension inscribed on the back of the (driver's) operator's license. Of course upon such suspension the Director of Revenue is the keeper of the archives in regard to driver's licenses and unless such suspension is shown on the records in the office in Jefferson City, out of which the license was initially issued, enforcement of the law will become handicapped. The suspension would not have the proper notice and would be difficult to prove in other jurisdictions. The depository of operators' licenses is provided for by statute in the office of the Director of Revenue at least in the spirit of the law if not in the precise letter. For the clearest indication of the legal intent it is thought best to here quote from Section 302.120, RSMo 1949, subsection 1, as follows:

"1. The director of revenue shall file every application for a license received by him and shall maintain suitable indices containing, in alphabetical order:

"(1) All applications denied and on each thereof note the reasons for such denial;

"(2) All applications granted; and

"(3) The name of every licensee whose license has been suspended or revoked by the director of revenue and after each such name note the reasons for such action."

Honorable Robert E. Wilson

Records of drivers are required to be kept in this centrally located depository. It is the State of Missouri that issues drivers' licenses and through the police power of the state in the regulation of traffic upon its streets and highways it is the State of Missouri that may take such license away. This is under the broad police power of the state and it may be done through the Director of Revenue, a circuit judge or a magistrate under the law, but in the final analogy it is the state lifting a license under the law and statutes of the state.

This matter is very thoroughly dealt with in the opinion to Mr. Barrick, mentioned above. However, in the event the suspension or revocation is not tabulated in Jefferson City, it could not have the statewide effect the law intended.

It will be noted that in the present wording of the statute that the powers of revocation and suspension, when required by law, are delegated, to partially quote from both sections 302.271 and 302.281, RSMo Cum. Supp. 1955, to "the director, circuit judge or magistrate." These two sections are identical in regard to the official having the power, duty or authority to revoke or suspend as the case may be. The new sections, 302.281 and 302.010, became effective August 29, 1955.

Section 302.281, quoted, in part, for our purposes, is as follows:

"1. The director, circuit judge or magistrate shall suspend the license of an operator or chauffeur for a period of not to exceed one year, upon a showing by the records of the director or any public records that the operator or chauffeur:"

Prior to August 29, 1955, the former definition of "habitual reckless or negligent driver" was contained in Subsection 7 of Section 302.010, Laws Mo. 1951, page 678. This law defined an habitual reckless or negligent driver as follows:

"A person convicted at least three times within two years of the charge of careless driving within or without this state."

The new definition requires only two such convictions to constitute an habitual reckless or negligent driver. Section 302.010, Laws Mo. 1951, page 678, was repealed and the effective date of the repeal was August 29, 1955.

Honorable Robert E. Wilson

Section 13, Article I, of the 1945 Constitution is as follows:

"That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted."

In regard to such constitutional provision the following exception stated in 11 Am. Jur, Sec. 367, page 1196, as follows:

"Exceptions exist to the general prohibition against retrospective laws, for such a constitutional provision does not inhibit certain retrospective laws made in furtherance of the police power of the state or laws which, although they may directly operate on vested rights, are, nevertheless, promotive of justice and the general good.
* * * * *

In State vs. Green, 360 Mo. 1249, 24 A.L.R.(2d) 340, 232 S.W. (2d) 897, at l.c. 900 there appears the following:

"* * * * A statute is not retrospective because it merely relates to prior facts or transactions but does not change their legal effect, or because some of the requisites for its action are drawn from a time antecedent to its passage, or because it fixes the status of a person for the purpose of its operation. Dye v. School District No. 32, 355 Mo. 231, 195 S.W. 2d 874, 879; 16 C.J.S., Constitutional Law, §414, page 857; State ex rel. Ross v. General American Life Ins. Co., 336 Mo. 829, 85 S.W. 2d 68, 74; Freeman v. Medler, 46 N.M. 383, 129 P. 2d 342; Cox v. Hart, 260 U.S. 427, 43 S. Ct. 154, 67 L.Ed. 332. We have many times held that a statute is not retrospective in its operation within the constitutional prohibition, unless it impairs a vested right. McManus v. Park, 287 Mo. 109, 116, 229 S.W. 211; State ex rel. Jones v. Nolte, supra. Nor is an act retrospective if it but substitutes a remedy or provides a new remedy. McManus v. Park, supra. * * * * *

In the case of City of Carthage vs. Garner, 209 Mo. 688, 108 S.W. 521, Mo. l.c. 702, Judge Graves stated for the court as follows:

Honorable Robert E. Wilson

"* * * But aside from that as above stated these two sections are but the exercise of the police power of the city, and no contract, whether by way of charter or otherwise, can take it away from the city or even abridge it in the least. If the charter granted to a corporation, or the contract with the city, undertook to abrogate or abridge this power, to that extent such instruments would be void. The corporation must exercise its charter and franchise rights subject to such reasonable police regulation as may be prescribed by the city. [City of Westport vs. Mulholland, 159 Mo. l.c. 92; State ex rel. vs. Murphy, 130 Mo. l.c. 23; State ex rel. v. Murphy, 134 Mo. l.c. 575; Railroad v. Milwaukee, 97 Wis. l.c. 422; Dillon's Municipal Corporations (4 Ed.) sec. 141.]"

Further, in reference to the license statutes, and nearer and closer to home, in Schwaller vs. May, 234 Mo. App. 185, 115 S.W. (2d) 207, l.c. 209, we have more discussion of a license, in this case a license to operate a motor vehicle:

"We are of course aware that the license issued to petitioner to operate a motor vehicle upon the streets of the city was in no sense a contract between him and the city so as to be the basis of any claim of absolute right on his part to its continued possession. To the contrary, it amounted to no more than a personal privilege extended to him to be exercised subject to the restrictions placed upon its use by the sovereign power of its creation, which means that he took it subject to the right of suspension or revocation on such conditions as the ordinance imposes."

There is no vested right in any individual entitling him to operate a motor vehicle upon the highways of the State of Missouri. In the case of People vs. Thompson, 259 Mich. 109, 242 N.W. 857, the court said at l.c. 861:

"In accepting the license (of operating a motor vehicle upon the public highways) from the state, one must also accept all reasonable conditions imposed by the state in granting the license.* * * * It is elementary law, where special privileges are granted by the state,

Honorable Robert E. Wilson

special duties in connection therewith may be exacted without providing compensation therefor. * * * The right to impose the condition is not based upon culpability, but, instead, it is incident to his status as a licensee."

It is elementary law that there is no private right to operate a motor vehicle upon the streets and highways of this state such as is protected by the constitutional inhibition against retrospective laws. There is the further application of the general rule as stated in the quotation from Am. Jur., supra, that such constitutional provision does not inhibit certain retrospective laws made in furtherance of police power of the state since the driver's license sections are directly in the furtherance of that power.

In *Dinger v. Burnham*, 360 Mo. 465, 228 S.W.(2d) 696, at l.c. 699, our Supreme Court stated as follows:

"(6-8) The purpose of statutes regulating and affecting automobile traffic on the highways is the promotion of the safety of the public. They are valid exercises of the police power. Automobiles may be safer than horse-drawn vehicles when prudently driven but the special training required for their operation and their potential power to harm when improperly operated imposes a duty to keep them out of the hands of the immature, the incompetent and the reckless. The facts of the instant case demonstrate the wisdom of the legislation. Our statutes declare that one under the age of sixteen years conclusively does not possess the requisite care and judgment to operate motor vehicles on the public highways without endangering life and property."

From the foregoing it is not believed that one convicted of the second charge of careless and reckless driving within a period of two years has cause to complain that his initial offense occurred at any date within the stated period since the rules go to his qualifications as a driver.

As to the effect of the repeal of a statute and its subsequent re-enactment, it is thought best to quote Section 1.120 RSMo, 1949, which is as follows:

"The provisions of any law or statute which is re-enacted, amended or revised, so far as they are the same as those of prior laws, shall be construed as a continuation of such laws and not as new enactments."

Honorable Robert E. Wilson

It is believed that this section is so clear and concise that it needs no further clarification.

In this case we have the repeal and re-enactment of a law which should in every respect merely mean the law's continuation. In 1952 the law was that an habitual, reckless or negligent driver was a person convicted three times within two years. In 1955 by a change of the definition the convictions required were cut to two. If the Legislature had intended to expunge all records of convictions of careless and reckless driving occurring prior to the August 29, 1955, effective date it could have said that in as many words. In the 1951 Laws, page 679, at l.c. 690, there appears the following: "Effective date of Act, January 1, 1952--this Act shall take effect on January 1, 1952."

Prior to that time there was no suspension law comparable to Section 302.281, supra. In the Laws of 1949, there was a revocation section for convictions of manslaughter, driving a motor vehicle while intoxicated, and using a motor vehicle in the commission of a felony. The 1949 law is silent however in regard to conditions requiring license suspensions. We have then the present Section 302.281, RSMo Cum. Supp. 1955, which was enacted originally as heretofore mentioned in 1951. As far as it is of present concern herein this same law was re-enacted intact in 1955. Changes made added the words "circuit judge or magistrate" in paragraph 1 and the word "careless" was substituted for the word "wanton" in subparagraph 1 of paragraph 1.

There was no change in the intent or purpose to cause the suspension of the licenses of careless and reckless drivers. The Legislature has taken a new look at an ever-changing situation. As the law stood in 1952, drivers could not be suspended for conviction occurring prior to January 1, 1952. As to convictions occurring subsequent to January 1, 1952, there is another situation. It is thought that the authorities, cited supra, sufficiently show that the constitutional inhibition against retrospective laws does not apply to drivers' laws which are enacted in furtherance of public safety. Two or three convictions of careless and reckless driving for which judgments and sentences have been meted out and satisfied, no matter how reprehensible, cannot be said to constitute a crime. It is merely a condition.

In *Commonwealth vs. Harris*, 278 Ky. 218, 128 S.W.(2d) 579, l.c. 580, it was stated by the Supreme Court of Kentucky as follows:

"Our conclusion in the *Burnett* case (274 Ky. 231, 118 S.W. 2d. 560) that the suspension of a driving license 'does not add to his punish-

Honorable Robert E. Wilson

ment; it merely prevents future violations of the law' is correct, and finds basis in application of sound principles of law, where under the police power exercised by the commonwealth, safety of life and property is the end to be gained."

It is believed that the above case states the law on this subject concisely. The suspension section of the drivers' license law is not an habitual criminal law. It is a safety device with the furtherance of the public safety as its purpose.

CONCLUSION

It is the opinion of this office that where an individual was convicted in June, 1956, of careless and reckless driving, and such individual had within two years prior to such time been convicted of careless and reckless driving, such individual's driving license is subject to suspension under the provisions of Section 302.281, RSMo Cum. Supp. 1955, providing for the suspension of a person who is an habitual reckless or negligent driver of a motor vehicle.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. James W. Faris.

Yours very truly,

John M. Dalton
Attorney General

JWF:mw

Enc.(1) Opinion to
Harold W. Barrick)

PUBLIC HEALTH & WELFARE, Dept. of: Attorney for Division may act as
referee on appeals to Director of
WELFARE, Division of: Department and may participate in
hearings.



March 12, 1956

Honorable John F. Winchester
Member, House of Representatives
Stoddard County
Bernie, Missouri

Dear Sir:

I have received your request for an opinion of this office,
which request reads as follows:

"My information is that when hearings are to be held on claims for Welfare benefits either the Director of Welfare or the Director of the Department of Public Welfare and Health designates one of the attorneys of the Department or the Division of Welfare to act as Referee at such hearing while at the same time actively conducting the defense as attorney before himself acting as Referee.

"Is this procedure allowable under Sec. 208.080, Subd. 3, if claimant objects to or protests against such attorney acting as referee before the hearing is begun?

"Again, can these Directors do anything they are not prohibited from doing by the Constitution or laws or can they do those things that they are authorized to do by the Constitution or laws and those only?

"Is there any officer authorized to act as Referee under the Welfare Code, taken as a whole?"

Section 208.080(3), RSMo, 1955 Supp., provides:

"The director of the department of public health and welfare shall give the applicant reasonable notice of, and opportunity for,

Honorable John F. Winchester

a fair hearing in the county of the residence of the applicant. The hearing shall be conducted by the director of the department of public health and welfare or a referee duly appointed for such purpose. Every applicant on appeal to the director of the department of public health and welfare shall be entitled to be present, in person and by attorney, at the hearing, and shall be entitled to introduce into the record at said hearing any and all evidence, by witnesses or otherwise, pertinent to such applicant's eligibility, and all such evidence shall be taken down, preserved and shall become a part of the applicant's record in said case, and upon the record so made the director of the department of public health and welfare shall determine all questions presented by the appeal, and shall make such decision as to the granting of assistance and the amount thereof as in his opinion is justified and in conformity with the provisions of this chapter."

It is our understanding that at least one of the attorneys employed by the Division of Welfare acts as referee in hearings conducted under this section. It is our further understanding that the position of referee is one for which the Personnel Department has prescribed the qualifications and the functions to be performed. We also understand that the referee, in hearing an appeal to the Director of the Department of Public Health and Welfare, does participate in the hearing by interrogating witnesses and by endeavoring to obtain, as completely as possible, all of the facts pertinent to the subject matter of the appeal. Presumably, when you speak of his "activity conducting the defense," this is the activity to which you refer, inasmuch as there is no other attorney in the hearing who represents the Division of Welfare.

Section 208.080(3), above quoted, in providing for the referee's conducting a hearing, still requires the decision to be made by the Director of the Department of Public Health and Welfare. The function of the referee is to procure, for the benefit of the Director, all of the evidence which will enable the Director to decide the matter. In such circumstances, we do not believe that the referee's participation in the hearing would be a violation of the appellant's constitutional rights or that it would prevent the procedure's being a fair hearing. Of course,

Honorable John F. Winchester

it would be possible to conceive of some circumstances under which the referee's conduct might be such as to cause the hearing to be unfair. In such circumstances, such unfair conduct of the hearing would be grounds for reversal of the cause on appeal to the circuit court under Section 208.100, RSMo 1949. We shall not attempt to detail matters which might cause the hearing to be considered unfair. Each such hearing would have to be considered on its own facts. However, the mere fact that the referee is also an attorney employed by the Division would not, in our opinion, cause the hearing to be unfair.

The only reference which we find in the reported cases in this state on this subject is found in the case of Bollinger v. State Dept. of Public Health and Welfare (St. Louis Court of Appeals), 254 SW2d 257. In that case the hearing had been conducted before a referee, and the court stated, 254 SW2d 1.s. 259:

"In the case at bar there could be no contention that the hearing itself was not conducted in a fair and impartial manner. Respondents were present in person and represented by an attorney. The referee carefully explained the issues and procedure. Without any restraint or objection the applicants were permitted to submit all the evidence they desired to offer."

The question presented by you is somewhat akin to the often-discussed problem of an administrative agency's acting as both prosecutor and judge in matters before it. However, as pointed out in 42 Am. Jur., Public Administrative Law, Section 21, page 312, Footnote 2:

"The spectacle of an administrative tribunal acting as both prosecutor and judge has been the subject of much comment but it has never been held that such procedure denies constitutional right."

Under the circumstances, we are of the opinion that the conduct of the hearings in the matter referred to in your opinion request does not violate constitutional or statutory rights and an objection prior to the hearing would not affect the situation.

As for your inquiry regarding the authority of the Director, that his power is limited by the Constitution and statutes, is elementary. In 43 Am. Jur., Public Officers, Section 249, page 68, the following statement of the law in this regard is found:

Honorable John F. Winchester

"In general, the powers and duties of officers are prescribed by the Constitution or by statute, or both, and they are measured by the terms and necessary implication of the grant, and must be executed in the manner directed and by the officer specified. If broader powers are desirable, they must be conferred by the proper authority. They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions. * * *

Of course, the Director also has incidental and implied powers necessary to enable him to perform the duties expressly imposed upon him. Thus, in 43 Am. Jur., Public Officers, Section 250, page 69, the law is stated as follows:

" * * * The duties of a public office include all those which fairly lie within its scope, those which are essential to the accomplishment of the main purposes for which the office was created, and those which, although incidental and collateral, are germane to, or serve to promote or benefit, the accomplishment of the principal purposes. But these implications are not to be extended beyond the fair inferences to be gathered from the circumstances of each case."

As for your question as to the authority of any officer to act as a referee under the Welfare Code, we are of the opinion that Section 208.080, above quoted, is sufficient to authorize the Director of the Department to designate referees to hear appeals to his office. In such circumstances, the matter of what particular officer shall be designated to perform such function rests within the discretion of the Director and his designation is sufficient to confer the authority upon the person so designated.

CONCLUSION

Therefore, it is the opinion of this office that:

1. An attorney employed by the Division of Welfare may be designated as referee by the Director of the Department of Public Health and Welfare to hear appeals to the Director under Section

Honorable John F. Winchester

208.080, RSMo, 1955 Supp.; such referee may actively participate in the hearing conducted by him; and an objection by the appellant prior to the hearing against the attorney's acting as referee would not preclude such procedure;

2. The Director of the Department of Public Health and Welfare and the Director of the Division of Welfare possess only such authority as may be conferred upon them by the Constitution and statutes and such as necessarily might be implied to enable them to perform the duties expressly imposed upon them;

3. The designation by the Director of the Department of Public Health and Welfare of a person to act as referee in a hearing, under Section 208.080, RSMo 1949, is sufficient to confer authority to act in such capacity upon the person so designated.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

Yours very truly,

JOHN M. DALTON
Attorney General

RRW:ml

CONCEALED WEAPONS

Sheriffs, deputy sheriffs, police officers, members of the highway patrol, town marshals, judges of courts, and all persons deputized by any of the above persons to aid in conserving the peace, or to serve criminal or civil process, are exempt from the provisions of Section 564.610. Further, that firearms capable of being concealed upon the person which were acquired prior to the enactment of the law requiring a permit before acquiring such firearms, does not apply to firearms so acquired prior to the enactment of the law. Further, the above section does apply to firearms acquired by Missouri residents in other states, or to firearms acquired by inheritance.

May 24, 1956

Honorable James E. Woodfill
Prosecuting Attorney
Vernon County
Nevada, Missouri

FILED 99



Dear Sir:

Your recent request for an official opinion reads as follows:

"In my official capacity as Prosecuting Attorney of Vernon County, Missouri, I wish to request an opinion from your office regarding the interpretation of the Missouri Statutes relating to firearms capable of being concealed upon the person.

"The first statute is Section 564.610 of the Missouri Revised Statutes of 1949. What persons in a third class county, other than police officers and sheriffs, are exempt from the provisions of said section?

"Sections 564.620 to 564.660 of the Missouri Revised Statutes of 1949 make it mandatory to secure a permit before acquiring such firearms. These sections were apparently taken from the Laws of 1921. My question regarding these sections is, do they apply to such firearms which were acquired prior to the passage of this law, acquired by inheritance or acquired out of the State of Missouri?

"In these cases, and in other cases where the firearms have been held for many years, never having been 'registered', it would now be impossible to procure the signature of the person from whom the weapon was acquired as is required by Section 564.630, because of the unavailability of such persons.

"As far as I can determine, there are no cases cited under these sections regarding the securing of a permit to acquire such weapons. My opinion would be that persons possessing such firearms which were acquired under the above circumstances, would not come within the provisions of these sections because of the impossibility

Honorable James E. Woodfill

of compliance therewith, but that if there are any further transfers of such firearms, such transfer should comply with the statutes.

"If you will give me an opinion on these matters it will be greatly appreciated as I have received inquiries from several persons who wish to comply with the law as to the possession of such firearms."

Your first question is, what persons in a third class county, other than police officers and sheriffs, are exempt from the provisions of Section 564.610, RSMo 1949.

The exemption clause of the above section reads as follows:

"* * * provided, that nothing contained in this section shall apply to legally qualified sheriffs, police officers and other persons whose bona fide duty is to execute process, civil or criminal, make arrests, or aid in conserving the public peace, nor to persons traveling in a continuous journey peaceably through this state."

The section prohibits carrying concealed weapons. It is clear that sheriffs, and their deputies, who have the same powers as the sheriff, would be exempt.

The term "police officers" has been held to include all members of the police force. Constables would not be included because your inquiry is as to a third class county, and the office of constable in second, third, and fourth class counties has been abolished since 1947. Members of the highway patrol are by Section 43.190, RSMo 1949 made peace officers.

In the case of State v. Davis, 284 Mo. 695, the Supreme Court of Missouri held that a justice of the peace was a conservator of the peace. A magistrate is made a conservator of the peace by Section 542.020 RSMo 1949, which reads:

"The following officers shall have power and jurisdiction to cause to be kept all laws made for the preservation of the public peace, to issue process for the apprehension of persons charged with criminal offenses, and hold them to bail; require persons to give security to keep the peace, and to execute the powers and duties herein conferred in relation thereto: The judges of the supreme court throughout the state; judges of the courts of record, except probate judges, within their respective juris-

Honorable James E. Woodfill

dictions; clerks and deputy clerks of magistrate courts within their respective counties; the mayors and police judges of incorporated cities and towns within the limits of their respective corporations; provided, that nothing herein contained shall be so construed as to authorize the mayors and police judges of incorporated cities and towns to exercise jurisdiction in prosecutions under the laws of this state, other than those instituted under sections 542.020 to 542.140 for surety to keep the peace."

The above listing is only partial. All persons who are made conservators of the peace are exempted from the operation of the statute. This would also include all persons deputized by sheriffs, or police, or peace officers, or courts, to conserve the peace and serve process, civil or criminal. A town marshal is made a conservator of the peace by Section 80.410, RSMo 1949.

The only discussion of this matter which we have been able to find is in the case of State v. Owen, 258 SW2d 662, which, at l.c. 665, reads in part:

"* * *The powers, authority and duties of sheriffs and of emergency deputy sheriffs such as defendant, are limited primarily to the county of the sheriff's election, the county for which the deputy sheriff is commissioned. In this case and under the instant circumstances defendant's power and authority was limited to Taney County. Section 57.110, State on inf. McKittrick, Att'y Gen. v. Williams, Sheriff, 346 Mo. 1003, 144 S.W. 2d 98, 104, 80 C.J.S., Sheriffs and Constables, § 36, p. 205. Defendant was a deputy sheriff in Taney County, but under instant circumstances he was not a deputy sheriff in Boone County. When in another county upon official business, which originates in the county of his election or appointment, a sheriff or his deputy clearly is entitled to the immunity of Section 564.610. But under these circumstances when in Boone County defendant was not entitled to the immunity of Section 564.610.

"It may be conceded that the exemption of Section 564.610 was written into that statute for obviously sound reasons. When within the territorial limits of his own county, the sheriff or his commissioned deputy may be called upon at any time to perform duties which may require the use or display of the

Honorable James E. Woodfill

weapons listed by this statute. But when such a deputy sheriff commissioned as above is on business of his own and in another county hundreds of miles from the county wherein he has deputy sheriff authority, and where he could not be called upon under any circumstances to conserve the peace or execute process or make arrests or use deadly weapons there is no logical reason whatever for the application of the exception. * * *

Your second question is whether Sections 564.620 through 564.660 RSMo 1949, apply to firearms which were acquired prior to the enactment of the law requiring a permit before acquiring such firearms. We think it clear that they do not.

Section 564.630 prohibits any person, other than a manufacturer or wholesaler, to transfer possession of a weapon capable of concealment upon the body without a permit.

Section 564.640 reads:

"Weapons must be stamped. - No person within this state shall lease, buy or in anywise procure the possession from any person, firm or corporation within or without the state, of any pistol, revolver or other firearm of a size which may be concealed upon the person, that is not stamped as required by section 564.620; and no person shall buy or otherwise acquire the possession of any such article unless he shall have first procured a written permit so to do from the circuit clerk of the county in which such person resides, in the manner as provided in section 564.630."

It will be observed that the above section applies only to acquiring these weapons, and we think clearly does not have any application to weapons which are already in the possession of some individual.

On December 29, 1955, this department rendered an opinion to J. W. Grossenheider, Prosecuting Attorney of Laclede County. We enclose a copy of this opinion, which opinion rules on the matter of the acquisition of firearms in other states. We believe that firearms acquired by inheritance would be subject to Section 564.610, supra.

CONCLUSION

It is the opinion of this department that sheriffs, deputy sheriffs, police officers, members of the highway patrol, town marshals, judges of courts and all persons deputized by any of the

Honorable James E. Woodfill

above persons to aid in conserving the peace, or to serve criminal or civil process, are exempt from the provisions of Section 564.610.

It is the further opinion of this department that firearms capable of being concealed upon the person, which were acquired prior to the enactment of the law requiring a permit before acquiring such firearms, does not apply to firearms so acquired prior to the enactment of the law.

It is the further opinion of this department that the above section does apply to firearms acquired by Missouri residents in other states, or to firearms acquired by inheritance.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours

John M. Dalton
Attorney General

HPW/ld

enc. (1)

SOCIAL SECURITY: Deputies and assistants to recorder of deeds,
DEPUTY RECORDERS: third class township organization counties, who
COUNTY EMPLOYEES, WHEN: are appointed and paid compensation under provisions of Sec. 59.250, Laws of Mo. 1953, p. 372, are "county employees" within meaning of Old Age and Survivors Insurance Law, Ch. 105, RSMo Cum. Supp. 1955, and Federal Social Security Laws, if county has sufficiently complied therewith to have employees covered. In such event, counties are liable for employers' portion of tax required by Sec. 3111, Subchapter (b), Federal Insurance Contributions Act.



May 24, 1956

Honorable James E. Woodfill
Prosecuting Attorney
Vernon County
Nevada, Missouri

Dear Mr. Woodfill:

This department is in receipt of your recent request for our official opinion, which reads, in part, as follows:

"With regard to the second question, I wish to determine who should pay the employer's contribution to the F.I.C.A. tax on a deputy's salary in the Office of the Recorder of Deeds. I have read several opinions which have held that assistants to certain county officers are deemed to be employees of such officers and not employees of the county, and that such officers should pay the employer's contribution to the F.I.C.A. tax, but I have been unable to find an opinion regarding the Recorder of Deeds.

"If the Recorder's Deputy is an employee of the Recorder, is the County Court authorized to reimburse the Recorder for amounts contributed by him to the F.I.C.A. tax on his deputy's salary?"

Vernon is a county of the third class and is operating under township organization. In said county, the offices of circuit clerk and recorder of deeds are separated, and we note that your inquiry involves the recorder of deeds and his deputies. Sections 59.250 and 59.365, Laws of Missouri, 1953, pp. 372 and 373, relate to the duties and compensation of the recorder of deeds in third class township organization counties where there is a separate circuit clerk and recorder. Section 59.250 reads as follows:

"1. The recorder of deeds in counties of the third class, wherein there is a separate

circuit clerk and recorder, shall keep a full, true and faithful account of all fees of every kind received. He shall make a report thereof each year to the county court.

* * * * *

The inquiry is whether or not the deputy of the recorder is an employee of the recorder. If he is an employee of that officer and the recorder pays the employer's contribution or F.I.C.A. tax as required under provisions of the Old Age and Survivors Insurance provisions of the Federal Social Security Act, is the county court authorized to reimburse the recorder for such payments made by him?

At the outset, we desire to point out that in the event all employees of a county are to receive the benefits of Old Age and Survivors Insurance under the Federal Social Security Act, the county court must comply with the provisions of Section 105.350, RSMo, Cum. Supp. 1955, by submitting a plan for approval to the state. The submission of such plan is discretionary with the county court, and the county employees are not entitled to the benefits under said law until the county elects to comply with same so that all county employees may be covered. Such was the conclusion reached by this department in an official opinion rendered to Honorable Rufe Scott, Prosecuting Attorney of Stone County on February 23, 1955. A copy of said opinion is enclosed for your consideration.

For the purpose of our discussion herein, it will be assumed that the Vernon County Court has submitted a plan for state approval as required by said Section 105.350, RSMo, Cum. Supp. 1955, which has been approved, and that county employees, including those whose compensation is paid in the form of fees, are covered under applicable provisions of the Social Security Law. In passing, we note from Section 59.250, supra, that the compensation of the recorder and that of his deputies or assistants is paid solely from fees received by the recorder.

In this connection we wish to make it clear that the present opinion is not passing upon the liability for contributions imposed upon the compensation of deputies of the recorder, other than that paid to them from fees of the recorder.

In the instant case, we note that the recorder of deeds, his deputies and assistants, under provisions of Section 59.250, supra, receive compensation from fees collected and such compensation is received in a certain mode or manner. This statutory manner is

Honorable James E. Woodfill

exclusive and they are entitled to no other or different compensation or method of receiving same than that specifically authorized by the statute.

Under said statutory provisions, the recorder is required to keep a full, true and faithful account of fees of every kind received, and to make a report of same each year to the county court. From all such fees received by him, he is authorized to retain the sum of \$4,750 as his compensation for each year of his official term. An amount sufficient to pay the compensation of necessary deputies and assistants shall also be paid out of fees received by the recorder. After paying the compensation of the recorder and that of his assistants, he shall pay over the remainder to the county treasurer. He shall be entitled to credit on his yearly report to the county court for such amounts necessary to pay his assistants, and it was so held in the case of State ex rel. Vernon County v. King et al., 136 Mo. 309, and the court said at l.c. 319 and 320:

"We are of the opinion, therefore, that the allowance to the recorder of reasonable compensation for necessary hire of assistants was not a matter of mere discretion with the county court. In his settlement, the recorder was entitled to a credit for the amount so paid; and, if such credit had been given, there would be, at most, but a small amount, if anything, due the county."

The recorder of deeds and assistants are paid compensation from fees collected by the recorder and fees over \$4,750 per year belong to the county and not to the recorder. Therefore, said deputies and assistants would be employees of the county instead of employees of the recorder, within the meaning of the Old Age and Survivors Insurance Law, and also of the Federal Social Security Law. This same principle was held to be the law in our legal opinion rendered to Honorable Philip A. Grimes, Prosecuting Attorney of Boone County on October 26, 1951, a copy of which is enclosed for your consideration. However, it will be noted that in this opinion the ruling is that contributions are to be made by the county only in those instances where county funds are involved.

In said opinion it was concluded that the deputy assessor and deputy collector of a third class county were "county employees" within the meaning of the Federal Social Security Law, and that the county was liable for the employer's contribution under said law.

Honorable James E. Woodfill

In view of the foregoing, it is our thought that deputies and other assistants of the recorder are "county employees" within the meaning of the Old Age and Survivors Insurance provisions of Chapter 105, RSMo, Cum. Supp. 1955, and that the county is liable for the employer's portion of the tax for said employees, as required by Section 3111, Subchapter (b) of the Federal Insurance Contributions Act.

CONCLUSION

It is, therefore, the opinion of this department that deputies and assistants of the recorder of deeds of a third class township organization county, who were appointed and receive compensation under authority of Section 59.250, Laws of Missouri, 1953, are "county employees" within the meaning of the Old Age and Survivors Insurance Law, Chapter 105, RSMo, Cum. Supp. 1955, and of the Federal Social Security Law, if the county has sufficiently complied with the applicable state and federal statutes to have its employees covered insofar as Social Security benefits to said employees are concerned. In that event, the county is liable for payments of the employer's portion of the tax as required by provisions of Section 3111, Subchapter (b) of the Federal Insurance Contributions Act.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Paul N. Chitwood.

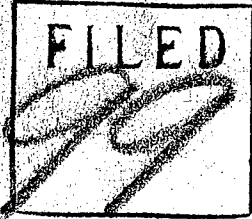
Very truly yours,



JOHN M. DALTON
Attorney General

PNC:hw:ml
Encs (2)

DOWER: If a husband dies intestate a widow gets one-half of the lands of her deceased husband if the husband is survived by issue and if he died after January 1, 1956; under the new Probate Code dower which was not vested was abolished as of January 1, 1956.



August 10, 1956

Honorable Thomas G. Woolsey
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"As you know Section 474.010 of the new Probate Code provides that if a decedent died intestate and is survived by issue, his widow inherits one-half of his property. Section 474.110 of said New Probate Code abolishes curtesy and dower but does not effect such estates vested prior to January 1st, 1956.

"Assume the following facts. A man and wife acquired a large acreage of land prior to January 1st, 1956, and title to said lands were in the husband's name alone. The couple had two children born prior to January 1st, 1956. The man died after January 1st, 1956, survived by his widow and two children.

"I would appreciate your construing the aforementioned sections together and rendering me an opinion as to the following:

- "(1) Does his widow get one-half of his lands?
- (2) Does his widow only have a dower interest in said lands?
- (3) If she has dower can she elect to take a child's part of said lands under the provisions of the old Probate Law?

Honorable Thomas G. Woolsey

(4) Is she entitled to dower and one-half of the property?"

The new Probate Code, to which you refer, became effective January 1, 1956, according to Section 1 of House Bill No. 30 of the 68th General Assembly.

As to when dower became vested under the old law we note the following in the case of Bank v. Kirby, 269 Mo. 285, at l.c. 295:

"Appellant simply had an inchoate right of dower in the real estate described in the mortgage. It is a contingent right, the value of which depends wholly upon the death of the husband. [Teckenbrock v. McLaughlin, 246 Mo. 711.] It may be terminated at any time by the death of the wife. It is in no sense a vested right growing out of the contract of marriage, but is a mere expectancy or possibility incident to the marriage relation, contingent on her surviving the husband. * * *"

Section 474.110 of the new Probate Code, to which you refer, reads as follows:

"The estates of curtesy and dower are hereby abolished, but any such estate now vested is not affected by this code."

We construe the above section to mean that the estate of dower is not affected by the going into effect of the section in those instances where a spouse died prior to January 1, 1956, and the estate of dower has vested in the surviving spouse, but that if a spouse dies after the going into effect of the section that the estate of dower does not vest. We do not see that any other construction is possible. Therefore the answers to your second, third, and fourth questions are in the negative.

Your first question is whether, under the situations set forth by you, the widow gets one-half of the lands of her husband. Section 474.010 of the Code reads in part as follows:

Honorable Thomas G. Woolsey

"General rules of descent. - All property as to which any decedent dies intestate shall descend and be distributed, subject to the payment of claims, as follows:

"(1) The surviving spouse shall receive:
(a) One-half thereof if the intestate is survived by issue, father, mother, brother or sister, or their descendants; * * *."

The above answers your first question in the affirmative.

CONCLUSION

It is the opinion of this department that if a husband dies intestate that a widow gets one-half of the lands of her deceased husband if the husband is survived by issue and if he died after January 1, 1956; that under the new Probate Code dower which was not vested was abolished as of January 1, 1956.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW:lc

PROBATE COURTS: In counties having more than thirty thousand and
CLERKS OF COURT: less than seventy thousand inhabitants, with an as-
sessed valuation in excess of thirty million dol-
lars, the county court may, where the need exists,
provide such additional clerks, deputy clerks and other employees in
the probate court as in its discretion it believes are required; and
provide funds for the payment of salaries of such employees in ad-
dition to the amounts specified in Sec. 483.475 RSMo Cum. Supp. 1955.

October 23, 1956

Honorable Scott O. Wright
Prosecuting Attorney
Boone County
Columbia, Missouri



Dear Mr. Wright:

Reference is made to your request for an official opinion of this office, wherein you inquire whether the county court in a county of the third class may, in their discretion, provide additional clerks, deputy clerks, or other employees in the probate court, and compensate such employees in addition to the amount specified in Section 483.475 RSMo Cum. Supp. 1955.

Section 483.475 RSM Cum. Supp. 1955, provides as follows:

"1. In all counties now or hereafter having more than thirty thousand inhabitants, the probate judges shall appoint their own clerks, assistants and stenographers, and shall determine their number and their salaries by order of record and may remove them when in the discretion of such judges it is deemed advisable. All salaries of such judges and their appointees shall be paid monthly by the county, upon requisition issued by the judge of such court.

"2. In all counties now or hereafter having more than thirty thousand and less than seventy thousand inhabitants, the total salaries of all clerks, assistants and stenographers in the probate court for any one calendar year shall not:

"(1) In counties with an assessed valuation of twenty million dollars or less, exceed the sum of one thousand two hundred dollars;

"(2) In counties with an assessed valuation of more than twenty million dollars and not more than thirty million dollars exceed the sum of two thousand and four hundred dollars;

"(3) In counties with an assessed valuation of over thirty million, exceed the sum of three thousand dollars.

"3. In all counties of class two such salaries for such year shall not exceed the sum of six thousand six hundred dollars. In any county where need exists, the county court is authorized to provide such additional clerks, deputy clerks or other employees in the probate court as the county court in its discretion believes are required and is authorized to provide funds for payment of salaries or parts of salaries of such clerks, deputy clerks and employees in addition to the amounts hereinbefore specified.

"4. In any county now or hereafter having two hundred and fifty thousand or more inhabitants, the total salaries of all clerks, assistants and stenographers for any calendar year shall not be such that the total salaries of such judge and his appointees shall exceed the total sum of fees received and accounted for by such judge for such year."

Said section authorizes the appointment of clerical and stenographic assistants in the office of the probate judge, and provides for their compensation by specifying the maximum amount that may be paid for such services according to population, assessed valuation, or county classification. We take note of the fact that Boone County has more than thirty thousand and less than seventy thousand inhabitants with an assessed valuation in excess of thirty million dollars. Under such circumstances Section 483.475 provides that the total salaries for all clerks, assistants, and stenographers in the probate court for any one calendar year shall not exceed the sum of three thousand dollars.

Paragraph 3 of said section provides that "in any county where need exists the county court is authorized to provide such additional clerks, deputy clerks or other employees in the probate court as the county court in its discretion believes are required." and further provides that the county court is authorized to provide funds for the payment of salaries in addition to the amounts specified. Said authority directly follows and is included in the paragraph relating to the maximum amount that can be paid for stenographic and clerical assistants in probate courts of counties of the second class. At first blush, it would appear that the authority of the county courts to provide additional clerks and stenographers and authorize their compensation in addition to the amounts specified

Honorable Scott O. Wright

relates only to counties of the second class. However, we do not believe that such authority was intended by the Legislature to be so limited.

A brief review of the legislative history of this section, we believe, will aid in clarifying this question. Section 483.475 was originally enacted in 1945. (Laws, 1945, p. 1514.) Said enactment did not then contain any provision authorizing the county courts to provide for and pay the salaries of any additional clerical and stenographic assistants. This section was amended in 1947. (Laws, 1947, p. 361). As amended the section reads as follows:

"Probate judge to appoint other employees. -- In all counties now or hereafter having more than 30,000 inhabitants, the probate judges shall appoint their own clerks, assistants and stenographers, and shall determine their number and their salaries by order of record, and may remove them when in the discretion of such judges it is deemed advisable. All salaries of such judges and their appointees shall be paid monthly by the county, upon requisition issued by the judge of such court. In all counties now or hereafter having more than 30,000 and less than 70,000 inhabitants, the total salaries of all clerks, assistants and stenographers in the probate court for any one calendar year shall not (a) in counties with an assessed valuation of \$18,000,000 or less exceed the sum of \$1200.00; (b) in counties with an assessed valuation of more than \$18,000,000 and not more than \$30,000,000 exceed the sum of \$1800.00; (c) in counties with an assessed valuation of over \$30,000,000 exceed the sum of \$2400.00; in any county now or hereafter having more than 70,000 and less than 250,000 inhabitants such salaries for such year shall not exceed the sum of \$4800.00; except that in counties where probate courts may be held in more than one place in any county, the county court may, at the cost of the county, provide such additional clerks, deputy clerks or other employees as may be required by the Probate Court and may provide funds for payment of salaries or parts of salaries of such officers or employees in addition to the amounts fixed by this section; and in any county now or hereafter having 250,000 or more inhabitants, the total salaries of all clerks, assistants and stenographers for any calendar year shall not be such that the total salaries of such judge and his appointees shall exceed the total sum of fees received and accounted for by such judge for such year.

"Approved May 6, 1948."

Honorable Scott O. Wright

Here, for the first time, appears the authority of the county court to provide for and pay additional clerical and stenographic assistants. However, said authority was at that time limited to counties where probate courts may be held in more than one place in the county. It does not appear that said authority was otherwise limited to a county of a particular class, population or assessed valuation. Said section was again amended in 1951. (Laws, 1951, p. 426.) The 1951 amendment omitted the provision relating to counties where probate courts may be held in more than one place in the county, and adopted the provision as now contained. By such amendment we believe that it is clear that the Legislature intended to confer upon any county the authority which had previously been restricted to counties where probate courts may be held in more than one place in the county. The 1951 amendment divided this section into paragraphs (identical to the present arrangement), whereas the 1947 enactment was contained in a single paragraph. However, it should be noted that the sequence of the matters contained remained the same. We do not believe that it can be said that the Legislature intended any change in substance merely by the arrangement of this section into paragraphs.

It should be further noted that said phrase refers to the "amounts" hereinbefore specified. If it had been the intention of the Legislature to limit the authority granted to county courts of counties of the second class, it would not have been necessary to use the plural, since only one amount is specified in regard to such counties.

CONCLUSION

Therefore, it is the opinion of this office that in counties having more than thirty thousand and less than seventy thousand inhabitants, with an assessed valuation in excess of thirty million dollars, the county court may, where the need exists, provide such additional clerks, deputy clerks and other employees in the probate court as in its discretion it believes are required, and provide funds for the payment of salaries of such employees, in addition to the amounts specified in Section 483.475 RSMo Cum. Supp. 1955.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Donal D. Guffey.

Very truly yours,

John M. Dalton
Attorney General

DDG/ld